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Section 1

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Regulations of the Secretary of Defense

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Title 32—NATIONAL DEFENSE

Chapter I—Office of the Secretary of Defense

REORGANIZATION AND REVISION OF CHAPTER

32 CFR Chapter I has been recodified in its entirety, except for Subchapter A—Armed Services Procurement Regulations, which retains its present numbering of Parts 1 to 30.

For convenient reference, there is shown below a table listing the former part numbers, their headings, and their newly assigned part numbers. Following that is the new Table of Contents, and a reprint of all regulations in Chapter I published in the FEDERAL REGISTER on or before November 30, 1960, and effective as to facts arising on or after December 1, 1960. Not included in this reprint is the former Part 71 of Subchapter E—Armed Forces Industrial Defense Regulations, since publication of this document in the FEDERAL REGISTER and Code of Federal Regulations has been discontinued.

NOTE: All of the regulations in this chapter, except the Armed Services Procurement Regulations (Subchapter A), have been reorganized and renumbered. The following table lists the former part numbers and headings, and indicates their position in the reorganized chapter.

Old Part No.		*New Part No.*
Parts 1–30		No change
41	Release of information medical records	66
42	Mortgage insurance for servicemen to aid in construction or purchase of homes	77
44	Administrative discharges	41
45	Participation in Reserve training programs	101
46	Optional retirement	48
47	Servicemen's dependents allowances	80
48	Fulfilling the military service obligation	50
49	Occasions upon which the uniform of any of the armed forces may be worn by persons honorably discharged therefrom	53
50	Enlistment and discharge of individuals with juvenile and youthful offender records	44
51	Reserve Officers' Training Corps and related Officers' training programs	105
52	Assignment to and transfer between Reserve categories, and discharge from Reserve status	115
53	Screening the Ready Reserve under provisions of the Armed Services Reserve Act of 1952, as amended	125
54	Reserve Forces active duty for training for basic training	132
56	Medical care for dependents of members of the uniformed services	70
57	Recruiting policy for secondary schools	63
58	Appointment of doctors of osteopathy as medical officers	74
59	Ordering the Ready Reserve to active duty in a national emergency declared by the President	127
60	Management and mobilization of the Standby Reserve	136
61	Military colleges in the Reserve Officers' Training Corps programs; subsistence and uniform commutation rates for enrolled members of the ROTC	110
62	Inter-service transfer of officers (Regular)	56
63	Inter-service transfer of Reserve Officers on extended active duty	120
64	Transfer of persons between Reserve components of the Armed Forces	123
65	Early release of military enlisted personnel for college enrollment	60
65a	Advance pay for military personnel	60
65b	Dropping retired military personnel from the rolls of the armed forces	87
65c	Recoupment of reenlistment bonus (Military)	88
66	Uniform rules of procedure for proceedings in and before boards of review	150
67	Industrial personnel security review regulations	155
81	Statement of policy for treatment of depreciation on emergency facilities	160
82	Defense contract financing regulations	163
83	Uniform negotiation for reimbursement of independent research and development costs	167
84	Payments on incentive-type and price redetermination-type contracts	165
141	Solicitation of commercial life insurance on military installations	276
141a	Solicitation of commercial life insurance on military installations in oversea areas	277
142	Release and authentication of copies of official records	285
143	Exemption of certain personnel from operation of sections 281, 283, 284, 434, and 1914 of Title 18, United States Code	95
144	Schedule of fees and charges for copying, certification and search of records	288
145	National industrial reserve regulations	266
146	Procurement inspection stamping	251
147	Correspondents accompanying the armed forces	271
148	Use of the Military Postal Service	280
149	Preference to blind persons in operating vending stands	260
150	Contributions of Federal funds to the States under the National Defense Facilities Act of 1950, as amended	262
151	Naturalization of alien spouses and/or alien adopted children of military and civilian personnel ordered overseas	90
153	International interchange of patent rights and technical information	264
154	Procurement inspection policies and procedures for items covered by military and Federal specifications	253
155	Department of Defense policies and procedures for assuring the quality of production of complex supplies and equipment	255
156	Department of Defense origin procurement inspection of subsistence	257
157	Use of standardization documents issued by industry groups	268
201	Transportation by Military Air Transport Service	175
202	Transportation by aircraft other than Military Air Transport Service	180
203	Reimbursable and nonreimbursable travel	210
208	Transportation of household goods of military and civilian personnel	190
209	Movement of personnel via commercial contract and charter air transportation	184
211	Policy governing transportation and accommodations of military personnel and their dependents, civilian employees and their dependents, when traveling via commercial, government or private transportation	171
213	Ocean transportation service	200

SUBCHAPTER A—ARMED SERVICES PROCUREMENT REGULATIONS

Part

1 General provisions.
2 Procurement by formal advertising.
3 Procurement by negotiation.
4 Special types and methods of procurement.
5 Interdepartmental procurement.
6 Foreign purchases.
7 Contract clauses.
8 Termination of contracts.
9 Patents, data, and copyrights.
10 Bonds and insurance.
11 Federal, State and local taxes.
12 Labor.
13 Government Property.
14 Inspection and acceptance.
15 Contract cost principles and procedures.
16 Procurement forms.
17 Extraordinary contractual actions to facilitate the national defense.
30 Appendixes to Armed Services Procurement Regulations.

SUBCHAPTER B—PERSONNEL; MILITARY AND CIVILIAN

41 Administrative discharges.
44 Enlistment and discharge of individuals with juvenile and youthful offender records.
48 Optional retirement.
50 Fulfilling the military service obligation.
53 Occasions upon which the uniform of any of the armed forces may be worn by persons honorably discharged therefrom.
55 Physical examinations and annual certificates of physical condition.
56 Inter-service transfer of officers (Regular).
60 Early release of military enlisted personnel for college enrollment.
63 Recruiting policy for secondary schools.
66 Release of information from medical records.
70 Medical care for dependents of members of the uniformed services.
74 Appointment of doctors of osteopathy as medical officers.
77 Mortgage insurance for servicemen to aid in construction or purchase of homes.
85 Advance pay for military personnel.
87 Dropping retired military personnel from the rolls of the armed forces.

Part
88 Recoupment of reenlistment bonus (Military).
90 Naturalization of alien spouses and/or alien adopted children of military and civilian personnel ordered overseas.
95 Exemption of certain personnel from operation of sections 281, 283, 284, 434 and 1914 of Title 18, United States Code.
101 Participation in Reserve training programs.
105 Reserve Officers' Training Corps and related Officers' training programs.
110 Military colleges in the Reserve Officers' Training Corps programs; subsistence and uniform commutation rates for enrolled members of the ROTC.
115 Assignment to and transfer between Reserve categories, and discharge from Reserve status.
120 Inter-service transfer of reserve officers on extended active duty.
123 Transfer of persons between Reserve components of the Armed Forces.
125 Screening the Ready Reserve under provisions of the Armed Forces Reserve Act of 1952, as amended.
127 Ordering the Ready Reserve to active duty in a national emergency declared by the President.
132 Reserve Forces active duty for training for basic training.
136 Management and mobilization of the Standby Reserve.

SUBCHAPTER C—REGULATIONS PERTAINING TO MILITARY JUSTICE

150 Uniform rules of procedure for proceedings in and before boards of review.

SUBCHAPTER D—SECURITY

155 Industrial personnel access authorization review regulation.

SUBCHAPTER E—DEFENSE CONTRACT FINANCING

160 Statement of policy for treatment of depreciation on emergency facilities.
163 Defense contract financing regulations.
165 Payments on incentive-type and price redetermination-type contracts.
167 Uniform negotiation for reimbursement of independent research and development costs.

SUBCHAPTER F—TRANSPORTATION

171 Policy governing transportation and accommodations of military personnel and their dependents, civilian employees and their dependents, when traveling via commercial, government or private transportation.
175 Transportation by Military Air Transport Service.
180 Transportation by aircraft other than Military Air Transport Service.
184 Movement of personnel via commercial contract and charter air transportation.
190 Transportation of household goods of military and civilian personnel.
200 Ocean transportation service.
210 Reimbursable and nonreimbursable travel.

SUBCHAPTERS G THROUGH L—[RESERVED]

SUBCHAPTER M—MISCELLANEOUS

251 Procurement inspection stamping.
253 Procurement inspection policies and procedures for items covered by military and Federal specifications.
255 Department of Defense policies and procedures for assuring the quality of production of complex supplies and equipment.
257 Department of Defense origin procurement inspection of subsistence.
260 Preference to blind persons in operating vending stands.
262 Contributions of Federal funds to the States under the National Defense Facilities Act of 1950, as amended.
264 International interchange of patent rights and technical information.
266 National Industrial Reserve regulations.
268 Use of standardization documents issued by industry groups.
271 Correspondents accompanying the armed forces.

SUBCHAPTER N—COMMERCIAL INSURANCE

276 Solicitation of commercial life insurance on military installations.
277 Solicitation of commercial life insurance on military installations in oversea areas.

SUBCHAPTER O—MILITARY POSTAL SERVICE

280 Use of the Military Postal Service.

SUBCHAPTER P—RECORDS

285 Release and authentication of copies of official records.
288 Schedule of fees and charges for copying, certification and search of records.

SUBCHAPTER A'—ARMED SERVICES PROCUREMENT REGULATIONS

PART 1—GENERAL PROVISIONS

Subpart A—Introduction

Sec.
1.100 Scope of subpart.
1.101 Purpose of subchapter.
1.102 Applicability of subchapter.
1.103 Arrangement of subchapter.
1.103–1 General plan.
1.103–5 Dating contract clauses.
1.104 Content of subchapter.
1.105 Amendment of subchapter.
1.106 Other Department of Defense publications.
1.106–1 Department of Defense directives and instructions.
1.106–2 Memorandums addressed to the Secretaries.
1.107 Dissemination and effective date of the subchapter and revisions.
1.108 Publications of the Military Departments.
1.109 Deviations from this subchapter and Department of Defense publications governing procurement.
1.109–1 Applicability.
1.109–2 Deviations affecting one contract or transaction.
1.109–3 Deviations affecting more than one contract or contractor.
1.109–4 Conflicts between Government-to-Government agreements and this subchapter.
1.110 Reports of purchases and contracts.
1.111 Reports of suspected criminal conduct and non-competitive practices.
1.111–1 Suspected criminal conduct.
1.111–2 Non-competitive practices.
1.112 Federal procurement regulations and General Services Administration regulations relating to procurement of supplies and services.
1.113 Code of conduct.

Subpart B—Definitions of Terms

1.201 Definitions.
1.201–1 Change order.
1.201–2 Contract modification.
1.201–3 Contracting officer.
1.201–4 Contracts.
1.201–5 Department and Military Department.
1.201–6 Department of Defense.
1.201–7 Head of a procuring activity.
1.201–8 Includes.
1.201–9 Labor surplus area concern.
1.201–10 May.
1.201–11 Negotiate and negotiation.
1.201–12 Possessions.
1.201–13 Procurement.
1.201–14 Procuring activity.
1.201–15 Secretary.
1.201–16 Shall.
1.201–17 Small business concerns.
1.201–18 Sources of supplies.
1.201–19 Amendment and supplemental agreement.
1.201–20 Supplies.
1.201–21 United States.

Subpart C—General Policies

1.300 Methods of procurement.
1.300–1 Competition.
1.300–2 Formal advertising.
1.300–3 Negotiation.
1.301 Interdepartmental and coordinated procurement.
1.302 Sources of supplies.
1.302–1 Government agencies.
1.302–2 Sources outside the Government.
1.302–3 Production and reasearch and development pools.
1.302–4 Foreign purchases.
1.302–5 Planned emergency producer.
1.303 Exchange of purchase information.
1.304 Selection of items involving proprietary data or other restrictive factors.
1.305 Time of delivery or performance.
1.305–1 Scope.
1.305–2 General.
1.305–3 Terms.
1.304–4 Time of delivery clauses.
1.306 Approval signatures.
1.307 Priorities, allocations and allotments.
1.307–1 General.
1.307–2 Required use of priorities, allocations and allotment clause.
1.308 Records of contract actions.
1.309 Solicitations for informational or planning purposes.
1.310 Liquidated damages.
1.311 Construction contracts, disclosure of Government estimate.
1.312 Voluntary refunds.
1.313 Procurement of parts.
1.314 Contracting officer's decision under the Disputes clause.

Subpart D—Procurement Responsibility and Authority

1.400 Scope of subpart.
1.401 Responsibility of each procuring activity.
1.402 General authority of contracting officers.
1.403 Requirements to be met before entering into contracts.
1.404 Special requirements to be met before entering into negotiated contracts.

Subpart E—Contingent or Other Fees

1.500 Scope of subpart.
1.502 Applicability.
1.503 Covenant against contingent fees clause.
1.504 Improper influence.
1.505 General principles and standards applicable to the covenant.
1.505–1 Contingent character of the fee.
1.505–2 Exceptions to the prohibition of the covenant.
1.505–3 Bona fide employee.
1.505–4 Bona fide established commercial or selling agency maintained by the Contractor for the purpose of securing business.
1.505–5 Fees for information.
1.506 Representation and agreement required from prospective contractors.

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Sec.
1.506–1 Interpretation of the representation.
1.507 Use of Standard Form 119.
1.507–1 Statement in lieu of form.
1.507–2 Exceptions.
1.508 Enforcement.
1.508–1 Failure or refusal to furnish Standard Form 119.
1.508–2 Misrepresentations or violations of the covenant against contingent fees.
1.509 Preservation of records.

Subpart F—Debarred, Ineligible, and Suspended Bidders

1.600 Scope of subpart.
1.601 Establishment and maintenance of a list of firms or individuals debarred or ineligible.
1.601–1 General.
1.601–2 Information contained in departmental lists.
1.601–3 Joint consolidated list.
1.601–4 Protection of lists.
1.602 Limitation.
1.603 Grounds for listing and treatment to be accorded listed concerns.
1.604 Causes and conditions under which departments may debar contractors.
1.604–1 Causes for debarment.
1.604–2 Period of debarment.
1.604–3 Notice of debarment.
1.605 Suspension of bidders.
1.605–1 Causes and conditions under which departments may suspend contractors.
1.605–2 Period of suspension.
1.605–3 Restrictions during period of suspension.
1.605–4 Notice of suspension.
1.606 Limited debarment or suspension.
1.607 Interchange of debarment information.
1.608 [Reserved]
1.609 Procurement outside the United States.
1.609–1 Responsibilities and area coverage.
1.609–2 Information contained on overseas lists.
1.609–3 Protection of lists.
1.609–4 Maintenance and distribution of lists.
1.609–5 [Reserved]
1.609–6 Basis of addition of firms and individuals on lists.
1.609–7 Treatment to be accorded firms or individuals in debarred or ineligible status.
1.609–8 Causes and conditions under which unified commanders may place names on the consolidated list.
1.609–9 Liaison with United States diplomatic missions.
1.610 Use of overseas lists within United States.

Subpart G—Small Business Concerns

Sec.
1.700 Scope of subpart.
1.701 Definitions.
1.701–1 Small business concern.
1.701–2 Established supplier.
1.701–3 Potential supplier.
1.701–4 Regular dealer (non-manufacturer) as small business concern.
1.702 General policy.
1.703 Determination of status as small business concern.
1.704 Small business officials.
1.704–1 Director for small business.
1.704–2 Departmental small business advisors.
1.704–3 Small business specialists.
1.705 Cooperation with the Small Business Administration.
1.705–1 General.
1.705–2 SBA representatives.
1.705–3 Screening of procurements.
1.705–4 Access to bidders' lists and other information.
1.705–5 Joint SBA-Defense small business set-aside program.
1.705–6 Certificates of competency.
1.705–7 Performances of contract by SBA.
1.706 Set-asides for small business.
1.706–1 General.
1.706–2 Review of SBA set-aside proposals.
1.706–3 Withdrawal or modification of set-asides.
1.706–4 Reporting for Department of Commerce procurement synopsis.
1.706–5 Total set-asides.
1.706–6 Partial set-asides.
1.706–7 Automatic dissolution of set-asides.
1.706–8 Contract authority.
1.706–9 Maintenance of records.
1.707 Subcontracting.
1.707–1 General policy.
1.707–2 Required clauses.
1.707–3 Defense subcontracting in small business programs.
1.707–4 Responsibility for reviewing subcontracting program.
1.707–5 Reports on DD Form 1140.
1.708 Mobilization planning.

Subpart H—Labor Surplus Area Concerns

1.800 Scope of subpart.
1.801 Definitions.
1.801–1 Labor surplus area concern.
1.801–2 Labor surplus area.
1.801–3 Small business concern.
1.802 General policy.
1.803 Application of policy.
1.804 Partial set-asides for labor surplus area concerns.
1.804–1 General.
1.804–2 Set-aside procedures.
1.804–3 Withdrawal of set-asides.
1.804–4 Contract authority.
1.805 Subcontracting.
1.805–1 General policy.
1.805–2 Required clause.
1.806 Depressed industries.
1.806–1 General.
1.806–2 Apparel industry (Notification No. 53).
1.806–3 Petroleum and petroleum products industry (Notification No. 58).
1.806–4 Shipbuilding industry (Notification No. 57).
1.806–5 Textile industry (Notification No. 38).

Subpart I—Responsible Prospective Contractors

1.900 Scope of subpart.
1.901 Applicability.
1.902 General policy.
1.903 Minimum standards for responsible prospective contractors.
1.903–1 General standards.
1.903–2 Additional standards for production, construction, and research and development contracts.
1.903–3 Ability to meet certain minimum standards.
1.903–4 Affiliated concerns.
1.904 Determinations of responsibility and nonresponsibility.
1.904–1 Requirement.
1.904–2 Exceptions.
1.905 Procedures for determining responsibility of prospective contractors.
1.905–1 General.
1.905–2 When information will be obtained.
1.905–3 Sources of information.
1.905–4 Pre-award surveys.
1.906 Subcontractor responsibility.
1.907 Disclosure of pre-award data.

Subpart J—Publicizing Procurement Actions

1.1001 General policy.
1.1002 Availability of invitations for bids and requests for proposals.
1.1003 Synopses of proposed procurements.
1.1003–1 General.
1.1003–2 Research and development.
1.1003–3 Synopses of subcontract opportunities.
1.1003–4 Responsibility of small business specialists.
1.1003–5 Publication of procurements of less than $10,000.
1.1003–6 Pre-invitation notices.
1.1003–7 Availability of specifications, plans, and drawings.
1.1003–8 Time of publicizing.
1.1003–9 Preparation and transmittal.
1.1004 Synopsis of contract awards.
1.1004–1 Preparation and transmittal.
1.1005 Paid advertisement in newspapers and trade journals.
1.1005–1 Scope.
1.1005–2 Definitions.
1.1005–3 General.
1.1005–4 Limitation.
1.1005–5 Authority and delegation.
1.1005–6 Requests for authority to place advertisement.
1.1005–7 Preparation of advertisement.
1.1005–8 Insertions.
1.1005–9 Rates.
1.1005–10 Proof of publication.
1.1005–11 Forms.
1.1005–12 Payment.
1.1006 Publicizing award information.
1.1006–1 Awards after formal advertising.
1.1006–2 Awards after procurement by negotiation.

Subpart K—Qualified Products

1.1101 General.
1.1102 Justification for establishment of a qualified products list.
1.1103 Qualification of products.
1.1103–1 Opportunity to qualify.
1.1103–2 Testing of product.
1.1103–3 Notification to manufacturer.
1.1104 Qualified products lists.
1.1104–1 General.
1.1104–2 Military lists.
1.1104–3 Department lists.
1.1104–4 Distribution of list, notice of qualification, and other information.
1.1104–5 Publicity purposes.
1.1104–6 Requirement that lists be kept open.
1.1104–7 Withdrawal of qualification and removal from list.
1.1104–8 Effect of debarment or suspension.
1.1105 Procurement of qualified products.
1.1105–1 General.
1.1105–2 Notice.

Subpart L—Specifications, Plans, and Drawings

1.1201 General.
1.1202 Mandatory specifications.
1.1203 Availability of specifications, plans, and drawings.
1.1204 Packaging requirements.
1.1205 Offshore procurement.
1.1206 Purchase descriptions.
1.1207 Alternate articles or qualities.

Subpart M—Transportation

1.1301 General.
1.1302 Place of delivery.
1.1302–1 Shipments within the United States.
1.1302–2 Shipments from the United States for oversea delivery.
1.1302–3 Shipments originating outside the United States.
1.1303 Quantity analysis.
1.1304 Commodity description.
1.1305 Delivery terms.
1.1305–1 F.o.b. origin or destination.
1.1305–2 F.o.b. destination.
1.1305–3 F.o.b. origin.
1.1305–4 Destination unknown.

Sec.
1.1306 Consignment and marking instructions.
1.1307 Scheduling of deliveries to permit consolidation of shipments.
1.1308 Transit arrangements.
1.1309 Rates and volume shipments.
1.1310 Crosshauling and backhauling.
1.1311 Unusually large or heavy shipments.
1.1312 Mode of transportation.

Subpart N—Preference for United States-Flag Privately Owned Ocean Carriers

1.1401 Definitions.
1.1402 General.
1.1405 Applicability.
1.1404 Procedures.
1.1405 Responsibilities.
1.1405–1 Military departments.
1.1405–2 Office of the Secretary of Defense.

AUTHORITY: §§ 1.100 to 1.1405–2 issued under R.S. 161, sec. 2202, 70A Stat. 120; 5 U.S.C. 22, 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314.

Subpart A—Introduction

§ 1.100 Scope of subpart.

This subpart sets forth (a) introductory information pertaining to the subchapter (its purpose, applicability, content, and arrangement), and (b) instructions for amending, implementing, disseminating, and deviating from the subchapter.

§ 1.101 Purpose of subchapter.

This subchapter, issued by the Assistant Secretary of Defense (Supply and Logistics) by direction of the Secretary of Defense, and in coordination with the Secretaries of the Army, Navy, and Air Force, establishes for the Department of Defense, uniform policies and procedures, relating to the procurement of supplies and services under the authority of chapter 137, Title 10 of the United States Code, or under other statutory authority.

§ 1.102 Applicability of subchapter.

This subchapter shall apply to all purchases and contracts made by the Department of Defense, within or outside the United States, for the procurement of supplies or services which obligate appropriated funds (including available contract authorizations), unless otherwise specified herein (but see § 1.109–4).

§ 1.103 Arrangement of subchapter.

The subchapter is divided into parts, each one of which deals with a separate aspect of procurement, and each part is further subdivided into subparts and sections.

§ 1.103–5 Dating contract clauses.

Contract clauses in this subchapter are identified by showing the month and year of issuance of the clause, as most recently revised, in parentheses immediately after the title, e.g. Incentive Price Revision (Jul. 1958). Where an alternative paragraph is provided for insertion in a clause, the identifying date is shown in parentheses immediately following the text of the paragraph. In contract forms using ASPR clauses, each clause should be shown with its identifying date in the manner prescribed above, except that (a) standard forms are not subject to this requirement and (b) Department of Defense forms and Departmental forms that were issued prior to October 1, 1960 should not be revised solely to meet this requirement. Where a clause to be used in a contract represents a deviation from this subchapter, a date will not be shown.

§ 1.104 Content of subchapter.

This subchapter will contain policies and procedures relating to the procurement of supplies and services and is designed to achieve maximum uniformity throughout the Department of Defense. Hence, implementation of this subchapter by the Military Departments should be kept to a minimum. This subchapter will be amended, from time to time, to set forth improved procedures which reduce contract preparation time, simplify and standardize contract forms within the Department of Defense, and improve the contracting process by standardizing procedures and instructions. In this connection, personnel at all levels, particularly the contracting level, are encouraged to submit through appropriate channels suggestions, based on operating experience, to reduce administrative burden, simplify contract forms and procedures, and otherwise accomplish the foregoing objectives.

§ 1.105 Amendment of subchapter.

This subchapter may be amended from time to time by the issuance of "Revisions", by the Assistant Secretary of Defense (Supply and Logistics) after coordination with the Secretaries of the Army, Navy, and Air Force. Unless otherwise directed in a particular case by the Assistant Secretary of Defense (Supply and Logistics), proposed amendments shall be submitted to the Armed Services Procurement Regulation Committee. Proposals for amendments originating within the military departments shall be submitted to the Chairman of the Armed Services Procurement Regulation Committee by the departmental members of the Committee. However, where unusual circumstances warrant, the Secretaries may submit proposals for amendments to the Assistant Secretary of Defense (Supply and Logistics).

§ 1.106 Other Department of Defense publications.

§ 1.106–1 Department of Defense directives and instructions.

Policies and procedures concerned primarily with procurement may be published in Department of Defense directives or instructions under any of the following circumstances:

(a) When the subject matter is classified.

(b) When the subject matter is not suitable for inclusion in this subchapter.

(c) As an interim measure, pending subsequent incorporation in the subchapter.

(d) When the policy or procedure is expected to be effective for a period of less than 6 months.

§ 1.106–2 Memorandums addressed to the Secretaries.

When the subject matter relates to one-time requests for information or instructions on a particular or individual matter, memorandums may be addressed to the Secretaries of the military departments.

§ 1.107 Dissemination and effective date of the subchapter and revisions.

This subchapter, and revisions thereof, will be distributed by the Departments to all interested activities and individuals. The military departments shall obtain from the Government Printing Office the number of copies of this subchapter, and revisions thereof, as are required to make distribution to all interested activities and individuals in each respective department. Revisions of this subchapter shall be effective at all applicable echelons 90 days after date of issuance, unless otherwise prescribed in any such revision.

§ 1.108 Publications of the Military Departments.

The Military Departments and procuring activities may issue directives and other publications to implement the Armed Services Procurement Regulation and other Department of Defense publications mentioned in § 1.106. Such implementation shall consist of providing for such delegations of authority and assignment of responsibilities and only such other implementing actions as are essential to the respective procurement operations of the Departments. Duplication of this subchapter shall be avoided to the extent feasible. In areas which are not fully covered by this subchapter, each Military Department may, consistent with the provisions of this subchapter, and other Department of Defense publications mentioned in § 1.106, maintain and issue such policies and procedures as are necessary for the efficient performance of procurement operations: *Provided, however,* That no Department shall adopt any policy or procedure (including methods, systems, instructions, practices, and contract clauses) which involves a major policy question without first coordinating with the other Military Departments through the ASPR Committee and obtaining the approval of the Assistant Secretary of Defense (Supply and Logistics) or, alternatively at the option of the Materiel Secretary through use of the Materiel Secretaries' Weekly Conference. Such approval involving Departmental publications shall be secured in advance unless exigency of the situation requires immediate action. Secretaries will determine whether a major policy question is involved. One copy of Departmental publications and directives (including those of procuring activities) will be furnished to the other Military Departments and to the Assistant Secretary of Defense (Supply and Logistics).

§ 1.109 Deviations from this subchapter and Department of Defense publications governing procurement.

§ 1.109–1 Applicability.

For the purposes of this section, a deviation shall be considered to be any of the following:

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(a) When a prescribed contract clause is set forth verbatim in this subchapter or a Department of Defense Directive, use of a contract clause covering the same subject matter which varies from the subchapter coverage or a Directive constitutes a deviation.

(b) When a Standard, DD, or other form is prescribed by subchapter or a Department of Defense Directive, use of any other form for the same purpose constitutes a deviation.

(c) Alteration of a Standard, DD, or other form (other than Departmental forms), except as authorized by subchapter or a Department of Defense Directive constitutes a deviation.

(d) When limitations are imposed in subchapter or a Department of Defense Directive upon the use of a contract clause, form, procedure, type of contract, or any other procurement action, including but not limited to the making or amendment of a contract, or actions taken in connection with the solicitation of bids or proposals, award, administration or settlement of contracts, the imposition of lesser or greater limitations constitutes a deviation.

(e) When a policy, procedure, method or practice of conducting procurement actions of any kind at any stage of the procurement process is covered by this subchapter, any policy, procedure, method, or practice which is inconsistent with that set forth constitutes a deviation.

§ 1.109–2 Deviations affecting one contract or transaction.

Deviations from this subchapter or a Department of Defense Directive which affect only one contract or procurement may be made or authorized in accordance with Departmental procedures: *Providing,* (a) Special circumstances justify a deviation and (b) written notice of such deviations is furnished to the Assistant Secretary of Defense (Supply and Logistics) and to the other Military Departments. Such written notice shall be given in advance of the effective date of such deviations unless exigency of the situation requires immediate action.

§ 1.109–3 Deviations affecting more than one contract or contractor.

Except as authorized in § 1.109–2, deviations from this subchapter or a Department of Defense Directive will not be effected unless approved in advance by the Assistant Secretary of Defense (Supply and Logistics): *Provided however,* That unanimous approval by the members of the ASPR Committee will constitute approval of the Assistant Secretary of Defense (Supply and Logistics) of all matters except those involving major policy. Written requests for such approval will be submitted to the Assistant Secretary of Defense (Supply and Logistics) through the ASPR Committee as far in advance as exigencies of the situation will permit, or alternatively, at the option of the Materiel Secretary concerned, through use of the Materiel Secretaries' Weekly Conference.

§ 1.109–4 Conflicts between Government-to-Government agreements and this subchapter.

In the event of any specific conflict between the provisions of this subchapter and any treaty or executive agreement to which the United States is a party, such treaty or agreement will govern: *Provided, however,* If such conflict affects a provision of this subchapter which is based on the requirements of law, such conflict shall, in accordance with Departmental procedures, be referred to the ASPR Committee for consideration. Any procurement action which constitutes a deviation from a provision of this subchapter based on a requirement of law shall be held in abeyance pending consideration by the ASPR Committee.

§ 1.110 Reports of purchases and contracts.

Periodic and special reports on purchases and contracts are prescribed by the Department of Defense. These reports are designed to meet statutory and other Congressional requirements, requirements of Federal agencies, and provide all levels of management with data on which to formulate procurement policy as well as to determine the extent of adherence to prescribed policy. Basic to the preparation of all these regular and special reports, so far as they affect individual contracting officers, is DD Form 350 (Individual Procurement Action Report) (§ 16.807). Each item of this form enters into the preparation of reports furnished the President, the Congress, and other Federal agencies, and is used for management purposes within the Department of Defense. The accuracy, completeness, and timeliness of these reports are fully dependent on the careful preparation and prompt submission of DD Form 350.

§ 1.111 Reports of suspected criminal conduct and non-competitive practices.

§ 1.111–1 Suspected criminal conduct.

Reports of possible violations of Federal criminal statutes relating to procurement shall be made by each respective Department in accordance with procedures prescribed by that Department. Department of Defense policies and procedures with respect to the debarment, ineligibility, and suspension of bidders are set forth in Subpart F of this Part 1.

§ 1.111–2 Non-competitive practices.

(a) Unless bids or proposals are genuinely competitive, contract prices tend to be higher than they should be. If the Secretary concerned or his representative considers that any bid received after formal advertising evidences a violation of the antitrust laws, he is required by 10 U.S.C. 2305(d) to refer such bids to the Attorney General for appropriate action. Similarly, evidence of such violations in negotiated procurements should be referred to the Attorney General. Practices which are designed to eliminate competition or restrain trade and which may evidence possible violations of such laws include collusive bidding, follow-the-leader pricing, rotated low bids, uniform estimating systems, sharing of the business, identical bids, etc.

(b) Contracting officers will report such practices in accordance with Departmental procedures. Reports of identical or equal bids or proposals should not be submitted automatically, but only where there is some reason to believe that those bids or proposals may not have been arrived at independently. Such reports should be accompanied by conformed copies of bid or proposal and contract documents and by other supporting data. The report should set forth:

(1) The non-competitive pattern or situation under consideration;

(2) Purchase experience in the same product or service for a reasonable period of time (one or more years) prior to the receipt of the bids or proposals under consideration, including unit and total contract price and abstracts of bids;

(3) Community of financial interest among bidders, insofar as is known;

(4) The extent, if any, to which specification requirements or patents restrict competition;

(5) Information which may be available with respect to the pricing system employed in bids or proposals believed to reflect non-competitive practices; and

(6) Any other information deemed pertinent.

(c) Evidence of non-competitive bid practices which, in the opinion of the Secretary concerned or his representative, may violate the antitrust laws shall be forwarded to the Attorney General.

§1.112 Federal procurement regulations and General Services Administration regulations relating to procurement of supplies and services.

All policy and procedural matter of Federal Procurement Regulations (See Chapter I of Title 41) and General Services Administration regulations which are to be made applicable to the Department of Defense and are within the scope of this subchapter will be codified herein prior to compliance therewith by the Military Departments. The applicable Department of Defense Directives covering the assignments of responsibility for the purchasing of specific supplies under Interagency Purchase Assignment will be incorporated by reference in this subchapter. For Department of Defense implementation of Federal Supply Schedules, see § 5.103.

§ 1.113 Code of conduct.

All governmental personnel engaged in procurement and related activities shall conduct business dealings with industry in a manner above reproach in every respect. Transactions relating to expenditure of public funds require the highest degree of public trust to protect the interests of the Government. While many Federal laws and regulations place restrictions on the actions of Governmental personnel, the latter's official conduct must, in addition, be such that the individual would have no reticence about making a full public disclosure thereof.

Subpart B—Definitions of Terms

§ 1.201 Definitions.

As used throughout this subchapter, the following terms shall have the meanings set forth below:

§ 1.201–1 Change order.

"Change order" means a written order, signed by the contracting officer, directing the contractor to make changes which the Changes clause of the contract (§§ 7.103–2 and 7.203–2 of this subchapter) authorizes the contracting officer to order without the consent of the contractor.

§ 1.201–2 Contract modification.

Contract modification means any written alteration in the specification, delivery point, rate of delivery, contract period, price, quantity, or other contract provisions of an existing contract, whether accomplished by unilateral action in accordance with a contract provision, or by mutual action of the parties to the contract. It includes (a) bilateral actions such as supplemental agreements, and (b) unilateral actions such as change orders, administrative notices of the exercise of a contract changes, notices of termination, and option.

§ 1.201–3 Contracting officer.

"Contracting officer" means any officer or civilian employee of any military department who, in accordance with departmental procedures, has been or shall be designated a contracting officer (and whose designation has not been terminated or revoked) with the authority to enter into and administer contracts and make determinations and findings with respect thereto, or any part of such authority, as hereinafter provided.

§ 1.201–4 Contracts.

"Contracts" means all types of agreements and orders for the procurement of supplies or services. It includes awards and notices of award; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job orders, task orders or task letters thereunder; letter contracts, letters of intent, and purchase orders. It also includes amendments and supplemental agreements with respect to any of the foregoing.

§ 1.201–5 Department and Military Department.

"Department and Military Department" include the Department of the Army, the Department of the Navy, and the Department of the Air Force.

§ 1.201–6 Department of Defense.

"Department of Defense" comprises the Office of the Secretary of Defense and the military departments.

§ 1.201–7 Head of a procuring activity.

"Head of a procuring activity" includes, for the Army, the chiefs of the technical services, the Zone of Interior Army commanders, the Chief of the National Guard Bureau, the Commanding General of the Military District of Washington, U. S. Army and the commanding generals of the major oversea commands; for the Navy, the Chief of each Bureau, the Chief of Naval Research, the Aviation Supply Officer, the Commander, Military Sea Transportation Service, and the Commandant of the United States Marine Corps; for the Air Force, the Commander, Air Materiel Command. It also includes the Executive Director of the Military Medical Supply Agency, the Executive Director of the Military Petroleum Supply Agency, and the head of any other procuring activity hereafter established. The number and designation of Heads of Procuring Activities within any military department may be changed by directive of the Secretary.

§ 1.201–8 Includes.

"Includes" means "includes but is not limited to."

§ 1.201–9 Labor surplus area concern.

See § 1.801–1.

§ 1.201–10 May.

"May" is used in a permissive sense. The words "no person may * * *" mean that no person is required, authorized, or permitted to do the act prescribed.

§ 1.201–11 Negotiate and negotiation.

"Negotiate and negotiation," when applied to the making of purchases and contracts, refer to making purchases and contracts without formal advertising.

§ 1.201–12 Possessions.

"Possessions" includes the Virgin Islands, the Canal Zone, Guam, American Samoa, Midway Island, and the guano islands, but does not include any territory or Puerto Rico.

§ 1.201–13 Procurement.

"Procurement" includes purchasing, renting, leasing, or otherwise obtaining supplies or services.

§ 1.201–14 Procuring activity.

"Procuring activity" includes, for the Army, the technical services, the continental armies, the National Guard Bureau, the Military District of Washington, and the major oversea commands; for the Navy, each Bureau of the Navy Department, the Office of Naval Research, the Aviation Supply Office, the Military Sea Transportation Service and the United States Marine Corps; for the Air Force, the Air Matériel Command. It also includes the Military Medical Supply Agency, the Military Petroleum Supply Agency, and any other procuring activity hereafter established. The number and designation of particular procuring activities of any military department may be changed by directive of the Secretary.

§ 1.201–15 Secretary.

"Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of any Military department.

§ 1.201–16 Shall.

"Shall" is used in an imperative sense.

§ 1.201–17 Small business concerns.

See § 1.701–1.

§ 1.201–18 Sources of supplies.

(a) Sources of supplies shall include only (1) manufacturers, (2) construction contractors, and (3) regular dealers.

(b) As used in paragraph (a) of this section:

(1) A manufacturer is a person or firm—

(i) Who owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract or of the general character described by the specifications; or

(ii) Who, if newly entering into a manufacturing activity of the type described in subdivision (i) of this subparagraph, has made all necessary prior arrangements for manufacturing space, equipment, and personnel, to perform the manufacturing operations required for contract performance;

And who, prior to being awarded a contract, satisfies the contracting officer that it qualifies under subdivision (i) or (ii) of this subparagraph;

(2) A regular dealer is any one of the following:

(i) A person or firm who owns, operates, or maintains a store, warehouse or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business; or

(ii) In the case of supplies of particular kinds (lumber and timber products, coal, machine tools, raw cotton, petroleum, green coffee, tea, agricultural liming materials, or hay, grain, feed, or straw), a person or firm satisfying the requirements of the Regulations of the Secretary of Labor (41 CFR 50–201.101 (b) and 50–201.603 (f)) under the Walsh-Healey Public Contracts Act (41 U. S. C. 35), as amended from time to time;

who, prior to being awarded a contract, satisfies the contracting officer that it is engaged in an established regular business meeting all of the criteria of subdivision (i) or (ii) of this subparagraph. (It is not enough in the case of a regular dealer to show only that arrangements have been made to set up such a business; before an award can be made, the dealer must show that it is an established going business regularly dealing in the particular supplies, or supplies of the general character, sought by the Government.)

(3) While 41 U. S. C. 35 covers only transactions exceeding $10,000 the Department of Defense policy is to apply the above standards in transactions of $10,000 or less. The above definitions shall not apply to contracts for supplies no part of which will be manufactured or furnished within the United States, its Territories, Puerto Rico, or the Virgin Islands.

(c) A manufacturer, construction contractor, or regular dealer may bid, negotiate, and contract through an authorized agent: *Provided*, That the agency is disclosed, and the agent acts and contracts in the name of his principal. In this connection, see the clause entitled, "Covenant Against Contingent Fees" set forth in § 7.103–20 of this chapter and the procedures prescribed for obtaining information concerning contingent or other fees, as set forth in Subpart E of this part.

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§ 1.201–19 Amendment and supplemental agreement.

"Amendment and supplemental agreement" are synonymous, and mean any contract modification which is accomplished by the mutual action of the parties.

§ 1.201–20 Supplies.

"Supplies" means all property except land or interests in land. It includes public works, buildings, facilities; ships, floating equipment, and vessels of every character, type, and description, together with parts and accessories thereto; aircraft and aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing. "Supplies" as used in this subchapter is synonymous with "property" as described in 10 U.S.C. 2303(b).

§ 1.201–21 United States.

"United States," when used in a geographic sense, means the States and the District of Columbia.

Subpart C—General Policies

§ 1.300 Methods of procurement.

§ 1.300–1 Competition.

All procurements, whether by formal advertising or by negotiation, shall be made on a competitive basis to the maximum practicable extent.

§ 1.300–2 Formal advertising.

Purchases and contracts for supplies and services shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. Procurement by formal advertising shall be in accordance with detailed requirements and procedures set forth in Part 2 of this subchapter.

§ 1.300–3 Negotiation.

If the use of formal advertising is not feasible and practicable, purchases and contracts for supplies and services may be negotiated in accordance with the detailed requirements and procedures set forth in Part 3 of this subchapter.

§ 1.301 Interdepartmental and coordinated procurement.

Supplies and services may be obtained in appropriate circumstances as provided in Part 5 of this subchapter by such means as interdepartmental and coordinated procurement.

§ 1.302 Sources of supplies.

§ 1.302–1 Government agencies.

To the extent possible, supplies shall be obtained from surplus property in the hands of disposal agencies, or from surplus or excess stocks in the hands of any Government agency. Interdepartmental purchases shall be made in accordance with the provisions of part 5 of this subchapter.

§ 1.302–2 Sources outside the Government.

Irrespective of whether the procurement of supplies or services from sources outside the Government is to be effected by formal advertising or by negotiation, competitive proposals ("bids" in the case of procurement by formal advertising, "quotations" in the case of procurement by negotiation) shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the Contracting Officer to assure such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the Department concerned, and thereby to obtain for the Government the most advantageous contract—price, quality, and other factors considered.

§ 1.302–3 Production and research and development pools.

(a) *Description.* A production or research and development pool is a group of concerns (1) who have associated together for the purpose of obtaining and performing jointly, or in conjunction with each other, contracts for supplies or services, or for research and development, for Defense use, (2) who have entered into a pool agreement governing their organization, relationship, and procedure, and (3) whose agreement has been approved either in accordance with section 708 of the Defense Production Act of 1950, as amended (Defense Production Pool), or in accordance with sections 9(d) or 11 of the Small Business Act, Pub. Law 85–536 (Small Business Pools). Pool participants are exempt from the "manufacturer or regular dealer" requirement of the Walsh-Healey Public Contracts Act and of § 1.201–18.

(b) *General rule.* Except as provided in this section, a pool shall be treated for purposes of Government procurement on exactly the same basis as any other prospective or actual contractor.

(c) *Ascertainment of status.* The contracting officer is responsible for ascertaining whether a group of firms seeking to do business with the Government is a pool. In ascertaining the status of a group representing that it is a pool, contracting officers may rely on a copy of the SBA or OCDM notification of approval of the pool. Each Department will expeditiously disseminate to contracting officers information received from SBA or OCDM concerning the approval of pools.

(d) *Contracting with pools.* (1) A bid or proposal of a pool is not eligible for award to the pool unless submitted either by the pool in its own name or by an individual member expressly disclosing that it is on behalf of the pool. Except as to contracts to be awarded to incorporated pools, the contracting officer shall prior to award to a pool require to be deposited with him a certified copy of a power of attorney from each member of the pool who is to participate in the performance of the contract authorizing an agent to execute the bid, proposal, or contract on behalf of such member. A copy of each such power of attorney shall be appended to each executed copy of the contract retained by the Government.

(2) Membership in a pool shall not of itself preclude individual members from submitting bids or proposals as individuals on appropriate procurements. Bids or proposals submitted by an individual member of a pool shall not be considered when the individual member has participated in the bid or proposal submitted by the pool.

(e) *Responsibility of pool member.* Where a member of a production pool has submitted a bid or proposal in its own name and not on behalf of a pool, the pool agreement shall be a factor to be considered in determining its responsibility, pursuant to Subpart I of this part.

§ 1.302–4 Foreign purchases.

Foreign purchases shall be made in accordance with the provisions of Part 6 of this title and upon compliance with any other applicable provisions of the subchapter.

§ 1.302–5 Planned emergency producer.

A "Planned Emergency Producer" is a concern with which one or more Government procuring activities have negotiated an emergency production assignment and which holds a valid planned emergency production schedule signed by the responsible Armed Services Procurement Planning Officer (ASPPO). In procurements of items for which there are planned emergency producers, such producers shall be solicited.

§ 1.303 Exchange of purchase information.

(a) Where the same item or class of items is being purchased by more than one Military Department, or by more than one procuring activity within a Department, the exchange and coordination of pertinent information between these Departments or procuring activities is desirable to promote uniformity of treatment of major issues and the resolution of particularly difficult or controversial issues. Generally, for a substantial purchase of a major item, the purchasing activity should request appropriate information from other purchasing activities responsible for buying similar items. Each activity receiving such requests shall furnish the information requested, if available. Such exchange and coordination of information is particularly beneficial during the procurement planning or pre-solicitation period.

(b) In negotiated procurement where available information from Government sources is inadequate, and in order to obtain basic information for the development of further data, the contracting officer, only in the negotiation with a prospective supplier, should inquire into previous contracts between that supplier and the Government for the same or similar items. In appropriate cases the request for proposals may contain a requirement that the offeror furnish information as to whether or not it has previously furnished the same item to any Government agency, and if so, identify recent contracts under which such items were furnished by contract numbers, dates, and purchasing activities.

§ 1.304 Selection of items involving proprietary data or other restrictive factors.

In some cases, the procurement of an item would involve proprietary data (see § 9.201(b) of this chapter) or other factors which would restrict sources of procurement or limit competition, but alternative items can be procured which would meet the military needs involved. In such cases, consideration should be given in selecting the item to be procured, to the relative advantages for national defense purposes of the item which involves such proprietary data or other factors as against the disadvantages of a restricted source of supply and possible increased cost to the Government because of lack of competition. However, where a particular item best meets military needs, the contracting activity should not refrain from procuring the item solely because it would involve such restrictions or limitations.

§ 1.305 Time of delivery or performance.

§ 1.305–1 Scope.

Sections 1.305—1.305–4 prescribe policy and procedure regarding requirements as to time of delivery or performance of contracts for supplies or services, excluding construction.

§ 1.305–2 General.

(a) The time of delivery or performance is an essential element for inclusion in a contract and must be clearly set forth in invitations for bids and requests for proposals. Delivery and performance schedules shall be designed to meet the requirements of the particular procurement, with due regard to all relevant factors, and must be realistic. Delivery and performance schedules which are unreasonably tight or difficult of attainment are inimical to full competition, inconsistent with small business policies (see § 1.702(b)(3)), and may result in higher contract prices. Therefore, prior to issuing an invitation for bids or request for proposals, the contracting officer shall question any delivery requirement which appears unrealistic, and, if necessary, initiate action to make appropriate adjustments, with due attention to relevant factors such as applicable transportation factors (see Subpart M of this part, and those listed below:

(1) Urgency of need for the supplies or services;

(2) Production time (quantity, complexity of design, etc.);

(3) Market conditions;

(4) Transportation time;

(5) Industry practices;

(6) Capabilities of small business concerns;

(7) Time for obtaining and evaluating bids or offers, and awarding contracts.

(8) Time for contractors to comply with any conditions precedent to contract performance; and

(9) Time for Government to perform its obligations under the contract (e.g., furnishing Government property to the contractor, approval of preproduction samples, and inspection).

(b) Where timely delivery or performance is unusually important to the Government, liquidated damages provisions may be used as provided in § 1.310.

(c) Invitations for bids and requests for proposals shall, except where clearly unnecessary, inform bidders or offerors of the basis on which their bids or proposals will be evaluated with respect to time of delivery or performance.

§ 1.305–3 Terms.

(a) Delivery schedules may be expressed in terms of:

(1) Specific calendar dates (e.g., on or before July 1, 1960);

(2) Specified periods from date of contract (i.e., date of award or acceptance by the Government, or date shown on contract document as effective date of contract); or

(3) Specified periods from date of receipt by contractor of notice of award or acceptance by the Government (including notice by receipt of contract document executed by the Government).

The full period which the Government holds out as being available for contract performance should not be curtailed to the prejudice of the contractor by delay in giving notice of award. Accordingly, one of the provisions in paragraph (b) or (c) of this section shall be used in advertised procurements and may be suitability modified and used in appropriate negotiated procurements (other than small purchases).

(b) Where the delivery schedule is in terms of specific calendar dates, invitations for bids will include one of the following provisions:

(1) The foregoing delivery requirements are based on the assumption that the Government will make award by [purchasing activity insert calendar date]. Each delivery date in the delivery schedule set forth herein will be extended by the number of calendar days after the above date that the contract is in fact awarded. Attention is directed to paragraph 8(d) of the Terms and Conditions of the Invitation for Bids, which provides that a written award mailed or otherwise furnished to the successful bidder results in a binding contract. Therefore, in computing the available time for performance, the bidder should take into consideration the time required for notice of award to arrive through the ordinary mails.

(2) The foregoing delivery requirements are based on the assumption that the successful bidder will receive the notice of award by [purchasing activity insert calendar date]. The Government will extend each delivery date in the delivery schedule set forth herein by the number of calendar days after the above date that the contractor receives notice of award: provided, that the contractor promptly acknowledges such receipt.

(c) Where the delivery schedule is based on the date of contract (see paragraph (a)(2) of this section), the invitations for bids will include the following provision:

Attention is directed to paragraph 8(d) of the Terms and Conditions of the Invitation for Bids which provides that a written award mailed or otherwise furnished to the successful bidder results in a binding contract. Any award hereunder, or a preliminary notice thereof, will be mailed or otherwise furnished to the bidder the day the award is dated. Therefore, in computing the time available for performance, the bidder should take into consideration the time required for the notice of award to arrive through the ordinary mails. However, a bid offering delivery based on date of receipt by the contractor of the contract or notice of award (rather than the contract date) will be evaluated by adding the maximum number of days normally required for delivery of the award through the ordinary mails. If, as so computed, the delivery date offered is later than the delivery date required in the invitation, the bid will be considered nonresponsive and rejected.

(d) Where the delivery schedule is based on the date of the contract (see paragraphs (a)(2) and (c) of this section), the contract, notice of award, acceptance of proposal, or other contract document executed by the Government shall be mailed or otherwise furnished the contractor on the day it is dated.

(e) Where the delivery schedule is based on date of receipt by the contractor of notice of award (see paragraph (a)(3) of this section), or where it is expressed in terms of specific calendar dates on the assumption that notice of award will be received by a specified date (see paragraph (b)(2) of this section), the notice of award, acceptance of proposal, or other contract document executed by the Government shall be sent by certified mail, return receipt requested, or shall be accompanied by a date of receipt acknowledgement card in accordance with Departmental procedures.

(f) When the required delivery schedule in the invitation for bids is based on the date of the contract (see paragraph (a)(2) of this section), a bid offering delivery based on date of receipt by the contractor of the contract or notice of award (see paragraph (a)(3) of this section):

(1) Shall be evaluated by adding the maximum number of days normally required for delivery of the award through the ordinary mails; and

(2) If the delivery date offered by the bid (computed in accordance with subparagraph (1) of this paragraph is later than the delivery date required in the invitation for bids, the bid shall be considered nonresponsive and rejected; but

(3) If award is made under subparagraph (1) of this paragraph, under the terms of the contract the delivery date will be the number of days, after actual receipt by the contractor of the notice of award, which were specified in the bid.

§ 1.305–4 Time of delivery clauses.

(a) Examples of time of delivery clauses for invitations for bids are set forth below. They may be modified or other clauses may be used to state particular delivery requirements or any special procedures to be used in the evaluation, rejection or award process as regards time of delivery. These clauses also may be suitably modified for use in negotiated procurements where appropriate.

(b) The following clause may be used where delivery by a particular time is necessary to meet the Government's requirements:

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TIME OF DELIVERY

Delivery is REQUIRED to be made in accordance with the following schedule:

Item No.	*Quantity*	*Time* [*]

Bids offering delivery of each quantity within the applicable delivery period specified above will be evaluated equally as regards time of delivery. Bids offering delivery of a quantity under such terms or conditions that delivery will not clearly fall within the applicable delivery period specified above will be considered nonresponsive and will be rejected. Where a bidder offers an earlier delivery schedule than that called for above, the Government reserves the right to award either in accordance with the REQUIRED schedule or in accordance with the schedule offered by the bidder. If the bidder offers no other delivery schedule, the delivery schedule stated above shall apply.

BIDDER'S PROPOSED DELIVERY SCHEDULE

(To be completed by bidder)

Item No.	*Quantity*	*Time* [*]

*Contracting officer shall insert the appropriate one of the following phrases, in both of the indicated spaces:

1. "[On] (on or before) the date(s) specified below."
2. "Within the number of days stated below after date of contract."
3. "Within the number of days stated below after the date of receipt of a written notice of award."
4. "Within the periods specified below." (NOTE: When this phrase is inserted, the wording "during month(s) of _____" or "not sooner than _____ and not later than _____" should be used to specify the periods.

(c) The following clause may be used where delivery by a certain time is desired, but not essential, and delivery by a specified later time is necessary to meet the Government's requirements.

TIME OF DELIVERY

Delivery is DESIRED by the Government in accordance with the following schedule:

Item No.	*Quantity*	*Time* [*]

If the bidder is unable to meet the above delivery schedule, he may, without prejudice to the evaluation of his bid, set forth his Proposed Delivery Schedule below; but such delivery schedule must not extend the delivery period beyond the time for delivery called for in the following REQUIRED delivery schedule set forth below:

REQUIRED DELIVERY SCHEDULE

Item No.	*Quantity*	*Time* [*]

Bids offering delivery of a quantity under such terms or conditions that delivery will not clearly fall within the applicable REQUIRED delivery period specified above will be considered nonresponsive and will be rejected.

If the bidder does not propose a different delivery schedule, the Government's DESIRED delivery schedule shall apply.

BIDDER'S PROPOSED DELIVERY SCHEDULE

(To be completed by bidder)

Item No.	*Quantity*	*Time* [*]

*Phrases for insertion as indicated above:

1. "[On] (on or before) the date(s) specified below."
2. "Within the number of days stated below after date of contract."
3. "Within the number of days stated below after the date of receipt of a written notice of award."
4. "Within the periods specified below." (NOTE: When this phrase is inserted, the wording "during the month(s) of _____" or "not sooner than _____ and not later than _____" should be used to specify the periods.)

§ 1.306 Approval signatures.

Approval signatures on contracts or purchase authorizations shall be minimized to the greatest practical extent and, in the event that multiple approval signatures are required, they shall, where possible, be obtained concurrently.

§ 1.307 Priorities, allocations and allotments.

§ 1.307–1 General.

In the interest of maintaining a minimum priorities and allocations system as a mobilization preparedness measure, it is national policy to require contractors to use rating and allotment authority to support military procurement, to the extent required by the Business and Defense Services Administration.

(a) *DOD Priorities and Allocations Manual.* Department of Defense implementation of all rules and regulations published by the Business and Defense Services Administration, with respect to which the Department of Defense is delegated administrative responsibility, will be published in the Priorities and Allocations Manual promulgated by Department of Defense Instruction 4410.1. Authorized deviations to the priorities and allocations rules and regulations will likewise be published in the Manual.

(b) *Operating responsibility.* In accordance with 1.403 (a), the Departments shall comply with the priorities and allocations program, including the Defense Materials System, as set forth in the Priorities and Allocations Manual and in the rules and regulations published by the Business and Defense Services Administration.

§ 1.307–2 Required use of priorities, allocations and allotment clause.

The contract clause set forth in § 7.104–18 of this subchapter shall be inserted in all rateable contracts whether entered into by formal advertising or negotiation, except that no such clause need be included in purchase orders of less than $5,000. The clause shall be added wherever practicable to existing rateable contracts whenever such contracts are amended for any other purpose and if additional purchases of materials for the contract are contemplated. Rateable contracts are those contracts for supplies which are required to be supported with rating and allotment authority (see Priorities and Allocations Manual, section 2–1).

§ 1.308 Records of contract actions.

(a) Each contract file shall contain documentation of actions taken with respect to the contract, including final disposition, sufficient to constitute a full history of the transaction, to permit ready reconstruction of all of the stages of the transaction to (1) support actions taken by various personnel in the procurement cycle, (2) provide information for reviews conducted by the Department concerned, the Department of Defense, the General Accounting Office, or others, (3) supply data for use in preparing replies to Congressional inquiries, and (4) furnish essential facts in the event of litigation. To the extent that retained copies of documents do not represent all actions taken, suitable memoranda or summary statements of undocumented actions should be prepared promptly and be retained in the contract file in chronological order.

(b) Each contract file shall include the following data, if applicable:

(1) A copy of the procurement directive or request;

(2) On negotiated procurement, a copy of the Determination and Findings statement and Request for Authority to Negotiate (see Subpart C, Part 3 of this chapter);

(3) The list of sources solicited or justification for limiting such sources;

(4) Any small business or labor surplus set-aside determinations (see §§ 1.706 and 1.804);

(5) A copy of the Invitation for Bids or the Request for Proposals, including the drawings and specifications or an identifiable reference thereto;

(6) The Security Requirements Check List (DD Form 254) (see § 16.811 of this chapter);

(7) All bids or proposals received, together with an abstract thereof;

(8) The bidders' Statements of Contingent Fees (see § 16.802 of this chapter);

(9) All pre-award surveys (see § 1.905–4);

(10) Selection of the successful contractor, including:

(i) The reasons for selection,

(ii) The contracting officer's determination of the contractor's responsibility (see § 1.904–1);

(iii) Any Small Business Administration Certificate of Competency (see § 1.705–6);

(11) All price and cost data submitted or used;

(12) A full record of negotiations, including but not limited to: participants; dates of meetings or phone calls; Government-furnished materials or facilities provided; subcontracting; terms and conditions agreed to; deviations, if any, from prescribed contract clauses; technical recommendations; and justification for final price;

(13) Justification for type of contract used (see § 3.304 of this chapter);

(14) Any exceptions or exemptions from the Buy American Act or appropriations act restrictions (see Part 6 of this chapter);

(15) A copy of contract or award;

(16) Required approvals of award;

(17) A copy of Individual Procurement Action Report (DD Form 350) (see § 16.807 of this chapter);

(18) A copy of Statement and Certificate of Award (SF 1036) (see § 16.801 of this chapter);

(19) All pertinent correspondence;

(20) Copies of all change orders, and supplements, with supporting documents;

(21) Comprehensive termination data;

(22) Copies of royalty reports received (see § 16.806 of this chapter);

(23) Final release upon completion of the contract; and

(24) Any additional documents reflecting actions peculiar to a specific activity or service.

(c) This section does not apply in the case of small purchases (see § 3.609 of this chapter).

§ 1.309 Solicitations for informational or planning purposes.

It is the general policy of the Department of Defense to solicit bids, proposals or quotations only where there is a definite intention to award a contract or purchase order. However, in some cases solicitation for informational or planning purposes may be justified. Invitations for bids and requests for proposals will not be used for this purpose. Requests for quotations may be issued for informational or planning purposes only with prior approval of an individual at a level higher than the Contracting Officer. In such cases, the request for quotation shall clearly state its purpose and, in addition, the following statement in capital letters shall be placed on the face of the request: "THE GOVERNMENT DOES NOT INTEND TO AWARD A CONTRACT ON THE BASIS OF THIS REQUEST FOR QUOTATION, OR OTHERWISE PAY FOR THE INFORMATION SOLICITED."

§ 1.310 Liquidated damages.

(a) This section applies to procurement by formal advertising and procurement by negotiation. Liquidated damages provisions normally will not be utilized but may be used where both: (1) The time of delivery or performance is such an important factor in the award of the contract that the Government may reasonably expect to suffer damages if the delivery or performance is delinquent, and (2) the extent or amount of such damages would be difficult or impossible of ascertainment or proof. Where a liquidated damages provision is to be used in a supply or service contract, insert the provision set forth in § 7.105–5 in accordance with the instructions thereof. Liquidated damages provisions for construction contracts are covered by the language in the Termination for Default-Damages for Delay-Time Extension Clause in § 8.709.

(b) The rate of assessment of liquidated damages must be reasonable, considered in the light of procurement requirements on a case-by-case basis, since liquidated damages fixed without reference to probable actual damages may be held to be a penalty and therefore unenforceable.

(c) The law imposes the duty upon a party injured by another to mitigate the damages which result from such wrongful action. Therefore, where a liquidated damages provision is included in a contract and a basis for termination for default exists, appropriate action should be taken expeditiously by the Government to obtain performance by the contractor or to terminate the contract. If delivery or performance is desired after termination for default, efforts must be made to obtain either delivery or performance elsewhere within a reasonable time. For these reasons, particularly close administration over contracts containing liquidated damages provisions is imperative.

(d) Whenever any contract includes a provision for liquidated damages for delay, the Comptroller General on the recommendation of the Secretary concerned is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable. Accordingly, recommendations concerning such remissions may be transmitted to the Secretary concerned in accordance with Departmental procedures.

§ 1.311 Construction contracts; disclosure of Government estimate.

(a) Except as provided in paragraph (c) of this section, in contracting for construction, access to or disclosure of information concerning the Government estimate shall be limited to Government personnel whose official duties require knowledge of the estimate.

(b) The Government estimate shall be initially designated "For Official Use Only," unless the nature of the information contained therein requires security classification, in which event it shall be handled in accordance with applicable security regulations. Such "Official Use" designation shall be removed only when the estimate is made public in accordance with paragraph (c) of this section.

(c) If the procurement is to be made by means of formal advertising, a copy of the Government estimate shall be sealed and kept locked with the bids until bid opening. Immediately after the bids have been opened, read, and recorded, the estimate shall be opened, the "For Official Use Only" designation removed and the estimate read and recorded in the same detail as the bids. In the case of a negotiated procurement, the "For Official Use Only" designation shall be removed immediately after award, and the estimate may then be released to an individual or firm upon request.

§ 1.312 Voluntary refunds.

A voluntary refund is an unconditional payment or credit, not required by any contract or other obligation, made to the Government by a contractor or subcontractor either as a voluntary payment, or as an adjustment under one or more contracts or subcontracts. In accordance with Departmental procedures, contracting officers and other authorized officials shall accept any voluntary refund which is proffered. Prime contractors should be encouraged to make voluntary refunds and to facilitate the making of such refunds by subcontractors.

§ 1.313 Procurement of parts.

(a) Parts for replenishment of stock, repair, or replacement, must be procured so as to assure the requisite safe, dependable, and effective operation of the equipment. Where it is feasible to do so without impairing this assurance, parts should be procured on a competitive basis, as in the kind of cases described in paragraph (b) of this section. However, where this assurance can be had only if the parts are procured from the original manufacturer of the equipment or his supplier, the procurement should be restricted accordingly, as in the kind of cases described in paragraph (c) of this section.

(b) Parts that are fully identified and can be obtained from a number of known sources, and parts for which fully adequate manufacturing drawings and any other needed data are available (or can be made available in keeping with the policies in Subpart B, Part 9 of this title), are to be procured on a competitive basis. In general, such parts are of a standard design configuration or have commercial equivalents. They include individual items that are susceptible of separate procurement, such as resistors, transformers, generators, spark plugs, or electron tubes.

(c) Parts not within the scope of paragraph (b) of this section generally should be procured (either directly or indirectly) only from sources that have satisfactorily manufactured or furnished such parts in the past, unless fully adequate data (including any necessary proprietary data), test results, and quality assurance procedures, are available (or can reasonably be made availabe in keeping with the policies in Subpart B, Part 9 of this title) to assure the requisite reliability and interchangeability of the parts, and procurement on a competitive basis would be consistent with the assurance described in paragraph (a) of this section. In assessing this assurance, the nature and function of the equipment for which the part is needed should be considered. To illustrate, acceptable tolerances for a commercial television part may be far less stringent than those for a comparable military radar part, permitting competitive procurement of the former but not of the latter. The exacting performance requirements of specially designed military equipment generally demand that parts be closely controlled and have proven capabilities of precise integration with the system in which they operate, to a degree that precludes the use of even apparently identical parts from new sources, since the functioning of the whole may depend on latent characteristics of each part which are not definitely known.

§ 1.314 Contracting officer's decision under the Disputes clause.

Where a final decision of the contracting officer involves a dispute that is subject to the procedure of a Disputes clause, or where there is doubt as to whether the decision is subject to such procedure, a paragraph substantially as follows shall be included in such decision:

This is the final decision of the Contracting Officer. Decisions on disputed questions of fact and on other questions that are subject to the procedure of the Disputes clause may be appealed in accordance with the provisions of the Disputes clause. If you decide to make such an appeal from this decision, written notice thereof (in triplicate) must be mailed or otherwise furnished to the Contracting Officer within thirty days from the date you receive this decision. Such notice should indicate that an appeal is intended and should reference this decision and identify the contract by number. The Armed Services Board of Contract Appeals is the authorized representative of the Secretary for hearing and determining such disputes. The Rules of the Armed Services Board of Contract Appeals are set forth in the Armed Services Procurement Regulation, Appendix A, Part 2.

Rule 4 of the Armed Services Board of Contract Appeals (Appendix A, Part 2) requires the contracting officer to advise the contractor of the Optional Accelerated Procedure of the Board (Rule 31) in appeals involving $5,000 or less.

Subpart D—Procurement Responsibility and Authority

§ 1.400 Scope of subpart.

This subpart deals with the procurement responsibility and authority of (a) the head of each procuring activity, and (b) Contracting Officers; and imposes limitations upon the authority to enter into contracts.

§ 1.401 Responsibility of each procuring activity.

Except as otherwise prescribed by procedures of each respective Department, the head of each procuring activity, as now or hereafter established, is responsible for the procurement of supplies and services under or assigned to the procurement cognizance of his activity. The head of each procuring activity is authorized, within limits imposed by his Department, to designate such person or persons as he may select as Contracting Officers, within the meaning of that term as used throughout this subchapter.

§ 1.402 General authority of contracting officers.

In accordance with the provisions of § 1.401 and subject to the requirements prescribed in §§ 1.403 and 1.404, any Contracting Officer is hereby authorized to enter into contracts for supplies or services, in accordance with procedures prescribed by the Department concerned, on behalf of the Government and in the name of the United States of America, whether by formal advertising or by negotiation or by coordinated or interdepartmental procurement as provided in this subchapter.

§ 1.403 Requirements to be met before entering into contracts.

Irrespective of whether procurement is to be effected by formal advertising or by negotiation, no contract shall be entered into unless:

(a) All applicable requirements of law, of this subchapter, and of procedures prescribed by each respective Department have been met; and

(b) Such business clearance or approval as is prescribed by applicable Department procedures has been obtained.

§ 1.404 Special requirements to be met before entering into negotiated contracts.

In addition to the requirements set forth in § 1.403, no contract shall be entered into as a result of negotiation until such determinations and findings as may be required with respect to the circumstances justifying negotiation and with respect to the use of a special method of contracting have been made by the persons and in the manner prescribed in Subparts C and D of Part 3 of this subchapter.

Subpart E—Contingent or Other Fees

§ 1.500 Scope of subpart.

This subpart sets forth the procedures to be followed and prescribes the form to be used for obtaining information concerning contingent or other fees paid by Contractors for soliciting or securing contracts from the Department of Defense, including the Departments of the Army, the Navy, and the Air Force.

§ 1.502 Applicability.

This subpart applies to all contracts.

§ 1.503 Covenant against contingent fees clause.

Every contract shall contain the clause entitled "Covenant Against Contingent Fees", as set forth in § 7.103–20 of this subchapter, except as provided in § 16.401–4(g) of this subchapter.

§ 1.504 Improper influence.

The term "improper influence" means influence, direct or indirect, which induces or tends to induce consideration or action by any employee or officer of the United States with respect to any Government contract on any basis other than the merits of the matter.

§ 1.505 General principles and standards applicable to the covenant.

The principles and standards set forth in this subpart are intended to be used as a guide in the negotiation, awarding, administration or enforcement, of all contracts.

§ 1.505–1 Contingent character of the fee.

Any fee whether called commission, percentage, brokerage, or contingent fee, or otherwise denominated, is within the purview of the covenant if, in fact, any portion thereof is dependent upon success in obtaining or securing the Government contract or contracts involved. The fact, however, that a fee of a contingent nature is involved does not preclude a relationship which qualifies under the exceptions to the prohibition of the covenant.

§ 1.505–2 Exceptions to the prohibition of the covenant.

Excepted from the prohibition of the covenant are "bona fide employees" and "bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

§ 1.505–3 Bona fide employee.

The term "bona fide employee", for the purpose of the exception to the prohibition of the covenant, means an individual (including a corporate officer) employed by a concern in good faith to devote his full time to such concern and no other concern and over whom the concern has the right to exercise supervision and control as to time, place, and manner of performance of work. It is recognized that a concern, especially a small-business concern, may employ an individual who represents other concerns. The factors set forth in § 1.505–4, except paragraph (d) of § 1.505–4, shall be applied to determine whether such an individual comes within the exception to the prohibition of the covenant.

(a) A person may be a bona fide employee whether his compensation is on a fixed salary basis, or when customary in the trade, on a percentage, commission or other contingent basis or a combination of the foregoing.

(b) The hiring must contemplate some continuity and it may not be related only to the obtaining of one or more specific Government contracts.

(c) An employee is not "bona fide" who seeks to obtain any Government contract or contracts for his employer through the use of improper influence or who holds himself out as being able to obtain any Government contract or contracts through improper influence.

§ 1.505–4 Bona fide established commercial or selling agency maintained by the Contractor for the purpose of securing business.

In determining whether an agency is a "bona fide established commercial or selling agency maintained by the Contractor for the purpose of securing business," the factors set forth in paragraphs (a) through (e) of this section shall be considered. They are necessarily incapable of exact measurement or precise definition and it is neither possible nor desirable to prescribe the relative weight to be given any single factor as against any other factor or as against all other factors. The conclusions to be reached in a given case will necessarily depend upon a careful evaluation of the agreement and other attendant facts and circumstances.

(a) The fees charged should not be inequitable and exorbitant in relation to the services actually rendered. That is, the compensation should be commensurate with the nature and extent of the services and should not be excessive as compared with the fees customarily allowed in the trade concerned for similar services related to commercial (non-Government) business. In evaluating reasonableness of the fee, there should be considered services of the agent other than actual solicitation, as for example, technical, consultant or managerial services, and assistance in the procurement of essential personnel, facilities, equipment, materials or subcontractors for performance of the contract.

(b) The selling agency should have adequate knowledge of the products and the business of the concern represented, as well as other qualifications necessary

to sell the products or services on their merits.

(c) There should ordinarily be a continuity of relationship between the Contractor and the agency. The fact that the agency has represented the Contractor over a considerable period of time is a factor for favorable consideration. It is not intended, however, to disqualify newly established Contractor-agent relationships where a continuing relationship is contemplated by the parties.

(d) It should appear that the agency is an established concern. The agency may be either one which has been in business for a considerable period of time or a new agency which is a presently going concern and which is likely to continue in business as a commercial or selling agency in the future. The business of the agency should be conducted in the agency name and characterized by the customary indicia of the conduct of a regular business.

(e) The fact that a selling agency confines its selling activities to the field of Government contracts does not, in and of itself, disqualify it under the covenant. The fact, however, that the selling agency is employed to secure business generally, that is, to represent the concern in connection with sales to the Government as well as regular commercial sales to non-Government activities is a factor entitled to favorable consideration in evaluating the case as one coming within the authorized exception. Arrangements confined, however, to obtaining Government contracts, particularly those involving a selling agency organized immediately prior to or during periods of expanded procurement resulting from conditions of national emergency, must be closely scrutinized.

However, any agency or agent is not "bona fide" which seeks to obtain any Government contract or contracts for its principals through the use of improper influence or which holds itself out as being able to obtain any Government contract or contracts through improper influence.

§ 1.505–5 Fees for information.

Contingent fees paid for "information" leading to obtaining a Government contract or contracts are included in the prohibition and, accordingly, are in breach of the covenant unless the agent qualifies under the exception as a bona fide employee or a bona fide established commercial or selling agency maintained by the Contractor for the purpose of securing business.

§ 1.506 Representation and agreement required from prospective contractors.

Except as provided in § 1.507–2, each Department shall inquire of and secure a written representation from prospective Contractors as to whether they have employed or retained any company or person (other than a full-time employee working solely for the prospective Contractor) to solicit or secure the contract, and shall secure a written agreement to furnish information relating thereto as required by the Contracting Officer. Where an invitation for bids is issued, this inquiry shall be made (and written representation and agreement secured) by requiring the bidder (or Contractor) to check the appropriate box in the following statement to be included in the invitation or bid form:

Bidder represents: (a) That he ☐ has, ☐ has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ☐ has, ☐ has not, paid or agreed to pay to any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract, and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer. (For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 44, Part 150.)

§ 1.506–1 Interpretation of the representation.

For the purpose of the representation and agreement required from the prospective Contractor, as described in § 1.506, the definition of "bona fide employee" is as specified in § 1.505–3.

(a) The fact that the prospective Contractor retains a person who does not devote his full time solely to the prospective Contractor does not necessarily mean that the relationship involved is in violation of the covenant against contingent fees or that there is any stigma attached to the Contractor-agent relationship. It does mean, however, that the prospective Contractor must fill out the representation in the affirmative and, as required, furnish information with respect to such employment, or retainer.

(b) If the representation would otherwise be answered in the affirmative the fact that the person employed or retained by the bidder or Contractor is an attorney, or a public relations consultant, or has any other special or professional title, does not permit answering in the negative.

§ 1.507 Use of Standard Form 119.

Except as provided in § 1.507–2, Standard Form 119 (December 1952 ed.) shall be used without deviation whenever either part of the inquiry provided for by § 1.506 is answered in the affirmative. The form shall also be used without deviation in any other case where a department desires to obtain such information. When, after use of the form, further information is required, it may be obtained in any appropriate manner. Submission of the form shall be required, normally, only of successful bidders and Contractors.

§ 1.507–1 Statement in lieu of form.

Any bidder or proposed Contractor who has previously furnished a Standard Form 119 (December 1952 ed.) to the office issuing the invitation or negotiating the contract may be permitted to accompany his bid, or submit in connection with the proposed contract, a signed statement (a) indicating when such completed form was previously furnished, (b) identifying by number the previous invitation or contract in connection with which such form was submitted, and (c) representing that the statements in such previously furnished form are applicable to such subsequent bid or contract. In such case, submission of an additional completed Standard Form 119 need not be required.

§ 1.507–2 Exceptions.

The inquiry and agreement specified in § 1.506 need not be made and submission of Standard Form 119 (December 1952 ed.) need not be requested in connection with the following:

(a) Any advertised contract in which the aggregate amount involved does not exceed $25,000;

(b) Any negotiated contract in which the aggregate amount involved does not exceed $5,000;

(c) Any negotiated contract for perishable subsistence supplies in which the aggregate amount involved does not exceed $25,000;

(d) Any contract for services which are required to be performed by an individual Contractor in person under Government supervision and paid for on a time basis;

(e) Any contract for public utility services furnished by a public utility company where the utility company's rates for the services furnished are subject to regulation by Federal, State, or other regulatory body and the public utility company is the sole source of supply;

(f) Contracts to be made in foreign countries;

(g) Any other contracts, individually or by class, designated by the Secretary. Reports of any such exceptions shall be filed promptly with the Administrator of General Services.

§ 1.508 Enforcement.

Each department shall take the necessary steps to assure that the indicated successful bidder or proposed Contractor has furnished a representation (negative or affirmative) and agreement as described in § 1.506.

(a) If the indicated successful bidder or proposed Contractor makes such representation in the negative, such representation may be accepted and award made or offer accepted in accordance with procedures of the Department concerned.

(b) If the indicated successful bidder or proposed Contractor makes such representation in the affirmative, a completed Standard Form 119 (December 1952 ed.) shall be requested from the bidder or proposed Contractor. In the case of formal advertising, the making of an award in accordance with established procedure of the Department concerned need not be delayed pending receipt of the form. In the case of negotiation, if the proposed Contractor makes such representation in the affirmative, he shall be required to file a completed Standard Form 119 (December 1952 ed.) prior to acceptance of the offer or execution of the contract unless the Secretary, or his authorized representa-

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tive, considers that the interest of the Government will be prejudiced by the suspension of negotiations pending receipt and consideration of an executed Standard Form 119 (December 1952 ed.).

(c) If the indicated successful bidder or proposed Contractor fails to furnish the representation and agreement as set forth in § 1.506, such failure shall be considered a minor informality and, prior to award, such bidder or proposed Contractor shall be afforded a further opportunity to furnish such representation and agreement. A refusal or failure to furnish such representation and agreement after such opportunity has been afforded shall require rejection of the bid or offer.

§ 1.508–1 Failure or refusal to furnish Standard Form 119.

If the successful bidder or Contractor, upon request, refuses or fails to furnish a completed Standard Form 119 (December 1952 ed.), or a statement in lieu thereof as provided in § 1.507–1, the Department concerned shall take one or more of the following actions, or other action, as may be appropriate:

(a) If an award has not been made or offer accepted, determine whether the bid or offer should be rejected.

(b) If the contract has been awarded or offer accepted, determine what action shall be taken, such as making an independent investigation or considering the eligibility of the Contractor as a future Contractor in accordance with established procedure of the Department concerned.

§ 1.508–2 Misrepresentations or violations of the covenant against contingent fees.

In case of misrepresentation, or violation or breach of the covenant against contingent fees, or some other relevant impropriety, the Department concerned shall take one or more of the following actions, or other action, as may be appropriate:

(a) If an award has not been made, or offer has not been accepted, determine whether the bid or offer should be rejected.

(b) If an award has been made or offer has been accepted, take action to enforce the covenant in accordance with its terms; that is, as the best interests of the Government may appear, annul the contract without liability or recover the amount of the fee involved.

(c) Consider the future eligibility as a Contractor of the bidder or Contractor in accordance with established procedure of the Department concerned.

(d) Determine whether the case should be referred to the Department of Justice in accordance with § 1.111.

§ 1.509 Preservation of records.

Departments shall preserve, for enforcement or report purposes, at least one executed copy of any representation and completed Standard Form 119 (December 1952 ed.) (or statement in lieu of form) together with a record of any other pertinent data, including data as to action taken.

Subpart F—Debarred, Ineligible, and Suspended Bidders

§ 1.600 Scope of subpart.

This subpart prescribes policies and procedures relating to the debarment of bidders for any cause, ineligibility of bidders under section 1a of the Walsh-Healey Public Contracts Act (41 U.S. Code 35a), and the suspension of bidders for alleged fraud or other criminal conduct.

§ 1.601 Establishment and maintenance of a list of firms or individuals debarred or ineligible.

§ 1.601–1 General.

Each Department shall maintain a list of firms and individuals which it has debarred or suspended, to whom contract awards of any character, including sales, will not be made, and from whom bids or proposals will not be solicited as provided in this Subpart F.

§ 1.601–2 Information contained in departmental lists.

Each Departmental list shall show as a minimum the following information:

(a) The names of those firms or individuals debarred, ineligible, or suspended (names will be set forth in alphabetical order with appropriate cross-reference where more than one name is involved in a single action);

(b) The basis of authority for each action;

(c) The extent of restrictions imposed; and

(d) The termination date for each debarred listing.

§ 1.601–3 Joint consolidated list.

By agreement among the Military Departments, the Department of the Army is responsible for the issuance of a Joint Consolidated List of firms and individuals to whom contracts will not be awarded and from whom bids or proposals will not be solicited. The Joint Consolidated List shall be kept current by notices of additions or deletions and periodic reprinting. Each Military Department shall furnish, not later than the 5th of each month, to the Office of the Assistant Secretary of the Army (Logistics) (Assistant Judge Advocate General), an alphabetical list of the additions, deletions, or modifications to the Joint Consolidated List, containing the information set forth in § 1.601–2. Each Military Department shall be responsible for determining the number of copies of the Joint Consolidated List required and for distributing the list within the Department. The Department of the Army will furnish copies to the Assistant Secretary of Defense (Supply & Logistics).

§ 1.601–4 Protection of lists.

The Joint Consolidated and Departmental Lists, and all correspondence relating thereto, shall be protected to prevent inspection of the contents by anyone other than Government personnel required to have access thereto.

§ 1.602 Limitation.

No firm or individual will be listed on a consolidated list for causes or under conditions other than those set forth in this subpart F.

§ 1.603 Grounds for listing and treatment to be accorded listed concerns.

(a) A firm or individual may be listed for any of several reasons. The particular reason for listing determines the consequences thereof. The various types of listing and the treatment to be accorded each type are set forth below:

Type A includes debarments in any of the following categories:

(1) Those listed by the Comptroller General pursuant to section 3 of the Walsh-Healey Public Contracts Act (41 U.S.C. 37) for violating the requirements of that Act;

(2) Those listed by the Comptroller General pursuant to section 3 of the Davis-Bacon Act (40 U.S.C. 376a–2(a)) for violating the requirements of that Act; and

(3) Those which the Secretary concerned or his representatives has determined to debar for any of the causes and under all of the conditions set forth in § 1.604.

Contracts shall not be awarded to, nor bids or proposals solicited from, nor invitations for bids nor requests for proposals furnished to, concerns which are listed as Type A and which are debarred because of Walsh-Healey or Davis-Bacon violations (categories (1) and (2) above). The same rules apply with respect to Type A listings within category (3) above, unless the Secretary concerned or his representative determines it to be in the interest of the Government to make an exception for a particular procurement action, or unless the listing indicates that the debarment is not to apply to sales contracts or to procurement contracts (see § 1–606).

Type B includes concerns which the Secretary of Labor has determined to be ineligible because they do not qualify as "manufacturers" or "regular dealers" within the meaning of section 1(a) of the Walsh-Healey Public Contracts Act (41 U.S.C. 35(a)). Under that Act, procurement contracts in excess of $10,000 shall not be awarded to concerns under Type B listings for those materials, articles, or equipment with respect to which the concern has been found to be ineligible. The Department of Defense, as a matter of policy, applies the same rule to contracts of $10,000 or less. However, contracts in any amount may be awarded, and bids or proposals may be solicited, for commodities with respect to which the concern has not been declared ineligible. In connection with ineligibility under the Walsh-Healey Act (Type B listing only), the name of an individual may be listed as affiliated with an ineligible firm. This listing is intended only to prevent such individuals from evading ineligibility merely by changing their business names and addresses. It does not prohibit other firms in which such individuals have an interest, and which are qualified manufacturers or regular dealers from receiving contracts subject to the Walsh-Healey Public Contracts Act.

Type C includes concerns which the appropriate Secretary, pursuant to section 3(b) of the Buy American Act (41 U.S.C. 10b(b)), has found to have failed to comply with the "Buy American Act" clause required for construction contracts (see § 6.205). Contracts for the construction, alteration, or repair of public buildings or public works in the United States or elsewhere shall not be awarded to concerns under Type C listings; nor shall bids or proposals for such work be solicited from such concerns. However, concerns under Type C listings may be awarded contracts and may be solicited for bids or proposals for other than the construction, alteration, or repair of public buildings or public works.

Type D includes concerns which the appropriate Secretary or his representative has

determined to suspend under the conditions set forth in § 1.605. Concerns under Type D listings shall not be awarded contracts, nor solicited for bids or proposals, except where the Secretary concerned or his representative determines it to be in the best interest of the Government to make an exception for a particular procurement, or where the listing indicates that the suspension does not apply to sales contracts or procurement contracts (see § 1.606). Authority to permit exceptions in keeping with the foregoing has been given to the Assistant Judge Advocate General for the Army, the Chief of Naval Material for the Navy, and the Deputy Chief of Staff, Materiel, for the Air Force.

Type E includes concerns which have been reported by the Secretary of Labor to have violated labor standards provisions of any of the following statutes: Anti-Kickback Act (48 Stat. 948) as amended (40 U.S.C. 276c), Eight Hour Law (27 Stat. 340) as amended (40 U.S.C. 321–326), National Housing Act (53 Stat. 804) as amended (12 U.S.C. 1703), Hospital Survey and Construction Act (60 Stat. 1040), Federal Airport Act (60 Stat. 170) as amended (49 U.S.C. 1101), Housing Act of 1949 (63 Stat. 413) (42 U.S.C. 1441), School Survey and Construction Act of 1950 (64 Stat. 967) (20 U.S.C. 251), and Defense Housing and Community Facilities and Services Act of 1951 (65 Stat. 293) as amended (42 U.S.C. 1591). Concerns under Type E listings shall not be awarded contracts which are subject to any of the foregoing statutes.

(b) Administration of current contracts in all phases may be continued, notwithstanding the listing of a contractor, unless otherwise directed by the Secretary concerned or his representative. However, payment of all or part of funds due or to become due may be withheld when such action is determined to be in the best interest of the Government by the Secretary concerned or his representative.

(c) Where a listed concern is proposed as a subcontractor, the contracting officer should, where appropriate, decline to consent to subcontracting with such concern.

§ 1.604 Causes and conditions under which departments may debar contractors.

The Secretary of each Department, or his authorized representative except as limited below, is authorized to debar in the public interest a firm or an individual for any of the causes and under all the conditions set forth below. Debarment of a firm or individual under this Subpart F shall operate to debar such firm or individual throughout the Department of Defense. Placing the name of an individual or firm on the consolidated list will be for the purpose of protecting the interest of the Government and not for punishment.

§ 1.604–1 Causes for debarment.

(a) Conviction by or a judgment obtained in a court of competent jurisdiction for (1) commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract; (2) violation of the Federal antitrust statutes arising out of the submission of bids or proposals; or (3) commission of embezzlement, theft, forgery, bridery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty, which seriously and directly affects the question of present responsibility as a Government contractor. If the conviction or judgment is reversed on appeal, the debarment shall be removed upon receipt of notification thereof. The foregoing does not necessarily require that a firm or individual be debarred. The decision to debar is discretionary; the seriousness of the offense, and all mitigating factors should be considered in making the decision to debar.

(b) Clear and convincing evidence of violation of contract provisions, as set forth below, when the violation is of a character so serious as to justify debarment action:

(1) Willful failure to perform in accordance with the specifications or delivery requirements in a contract;

(2) A history of failure to perform, or of unsatisfactory performance, in accordance with the terms of one or more contracts: *Provided,* That such failure or unsatisfactory performance is within a reasonable period of time preceding the determination to debar. Failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered as a basis for debarment;

(3) Violation of the contractual provision against contingent fees; or

(4) Violation of the "Gratuities" clause, as determined by the Secretary in accordance with the provisions of the clause.

(c) For other cause of such serious and compelling nature as may be determined by the Secretary of the Department concerned to justify debarment.

(d) Debarment for any of the above causes by some other executive agency of the Government. Such debarment may be based entirely upon the record of facts obtained by the original debarring agency, or upon a combination of additional facts with the record of facts of the original debarring agency.

§ 1.604–2 Period of debarment.

All debarments shall be for a reasonable, definitely stated period of time, commensurate with the seriousness of the cause therefor. As a general rule, a period of debarment should not exceed 5 years following the date of conviction for fraud or other criminal offense, or 3 years following the date of debarment for any other cause. However, with respect to debarment for violation of the nondiscrimination clause, the debarment shall be removed prior to the expiration of the debarment period by the Secretary who imposed the debarment upon receipt of satisfactory evidence that corrective action has been taken. In the event debarment is preceded by suspension, consideration shall be given to such period of suspension in determining the period of debarment.

§ 1.604–3 Notice of debarment.

(a) The firm or individual concerned shall be furnished with a written notice of the proposed debarment stating as a minimum (1) the fact that debarment is being considered, (2) the reasons for the proposed debarment, and (3) the period of time to be afforded to present information for consideration. If debarment is effected, the firm or individual shall be notified in writing within 10 days after determination of debarment has been made. This notice shall (i) reference the earlier notice of proposed debarment, (ii) specify the reasons for debarment, (iii) state the period of debarment, including effective dates, and (iv) advise that the debarment is effective throughout the Department of Defense. If, following the notice of proposed debarment, a determination is made that debarment will not be effected, the firm or individual shall be notified in writing accordingly.

(b) Copies of the notice of debarment and of any removals from such debarment shall be furnished to the General Services Administration.

§ 1.605 Suspension of bidders.

Suspension of a contractor or bidder is a drastic action which must be based upon adequate evidence rather than mere accusation. Placing the name of an individual or firm on the consolidated list will be for the purpose of protecting the interest of the Government and not for punishment. The suspension of a bidder is an administrative determination which may be modified when determined to be in the interest of the Government.

§ 1.605–1 Causes and conditions under which departments may suspend contractors.

(a) The Secretary of a Department or his authorized representative may, in the interest of the Government, suspend a firm or individual:

(1) Suspected of:

(i) Commission of fraud or a criminal offense as an incident to obtaining, attempting to obtain, or in the performance of a public contract;

(ii) Violation of the Federal antitrust statutes arising out of the submission of bids and proposals; or

(iii) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty, which seriously and directly affects the question of present responsibility as a Government contractor; or

(2) For other cause of such serious and compelling nature as may be determined by the Secretary of the Department concerned to justify suspension.

(b) Suspension of a firm or individual by the Secretary of a Department, or his authorized representative, shall operate to suspend such firm or individual throughout the Department of Defense.

§ 1.605–2 Period of suspension.

All suspensions shall be for a temporary period pending the completion of investigation and such legal proceedings as may ensue. Upon the completion of such investigation or proceedings, the suspension shall be removed and, if appropriate, changed to a debarment in accordance with § 1.604–1(a).

§ 1.605–3 Restrictions during period of suspension.

During a period of suspension of a firm or individual, the following policies

and procedures shall be applicable:

(a) Bids and proposals will not be solicited from suspended contractors. If received, bids and proposals will not be considered and award for contracts may not be made to suspended contractors unless it is determined to be in the best interest of the Government by the Secretary of a Department or his authorized representative.

(b) Suspended contractors will be subject to the provisions of § 1.603 (b) and (c).

§ 1.605–4 Notice of suspension.

(a) The firm or individual concerned shall be furnished a written notice by the Secretary of the Department concerned, or his authorized representative, of the suspension within 10 days after the effective date of the suspension. The notice of suspension shall state—

(1) That the suspension is based on information that the firm or individual has committed irregularities of a serious nature in business dealings with the Government or that the suspension is based on irregularities which seriously reflect on the propriety of further dealings of the firm or individual with the Government;

(2) That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;

(3) That bids and proposals will not be solicited from the firm or individual and if received will not be considered, and awards of contracts may not be made unless it is determined to be in the best interest of the Government by the Secretary of the Department or his authorized representative to do so; and

(4) That the suspension is effective throughout the Department of Defense.

(b) All inquiries concerning suspended contractors shall be referred to the Secretary of the Department concerned or his authorized representative for appropriate action. The Department shall not give further information to the contractor or his representatives concerning the reasons for suspension beyond that stated in the notice of suspension set forth above until the Department of Justice has been advised of the inquiry.

§ 1.606 Limited debarment or suspension.

Where it is determined to debar or suspend a concern pursuant to § 1.604–1 or § 1.605–1, the responsible official shall decide whether the debarment or suspension should extend to procurement contracts or to sales contracts or to both. If the debarment or suspension is limited either to procurement contracts or to sales contracts the listing should so indicate.

§ 1.607 Interchange of debarment information.

(a) The General Services Administration is charged by GSA Regulation 1–II–207.07 with compiling from the notifications of debarments furnished them by the Military Departments and executive agencies, a combined list of such debarments, including the basis of action, and distributing a copy of such lists to all executive agencies including the Military Departments. In general application, this listing will be for information purposes only and it is not intended to take the place of, or be in addition to, the lists maintained by the various agencies.

(b) Each Department will notify the General Services Administration of the name and address of its central office where debarment information should be sent.

(c) Each Department will check the list of debarred bidders furnished by the General Services Administration and consider firms or individuals listed thereon for inclusion upon their own lists, in accordance with the provisions of this Subpart F.

(d) On specific request, the General Services Administration has agreed to furnish to the Military Departments a copy of the notice reflecting the basis for debarment action taken by another agency for causes contained in § 1.604–1 (subsection 207.05a of GSA Regulation 1–II) or under the Buy American Act. If desired, direct inquiry concerning any debarment case may be made to the agency which originated the action.

§ 1.608 [Reserved]

§ 1.609 Procurement outside the United States.

In regard to procurement outside the United States, its Territories and possessions, the principles and procedures set forth in the foregoing provisions of subpart F of this Part 1 will be applied by overseas commanders whenever possible, and as modified by the following provisions, with due consideration to laws or customs of the foreign countries in which such lists are to be applicable.

§ 1.609–1 Responsibilities and area coverage.

The Commander-in-Chief, United States European Command, the Commander-in-Chief, Pacific, and the Commander-in-Chief, Caribbean, or the Commanders of a component command which each of the these unified commanders may designate, will establish and maintain a consolidated list of offshore suppliers to whom contracts will not be awarded and from whom bids or proposals will not be solicited. The CINCEUR consolidated list will include names in the North Atlantic and Mediterranean areas including all of Europe, North Africa and the Middle East. The CINCPAC consolidated list will include names in the Far East and Pacific Ocean areas excluding United States Territories and possessions. The CINCARIB consolidated list will include names in Central and South America excluding Territories and possessions. All other overseas commanders will utilize and contribute to such list as appropriate to their geographical location or areas in which they award contracts. Lists shall not be established or maintained except as provided above.

§ 1.609–2 Information contained on overseas lists.

The lists shall show as a minimum the following information:

(a) The names and addresses of those firms or individuals to whom contracts shall not be awarded and from whom bids or proposals will not be solicited. (Names will be set forth in alphabetical order with appropriate cross reference where more than one name is involved in a single action and where a parent firm or individual in one country is known to control subisidiaries, branches, or agencies in the same or other countries.)

(b) The basis or authority for each action;

(c) The extent of restrictions imposed;

(d) The termination date for each debarred listing; and

(e) The originating activity, component or agency.

§ 1.609–3 Protection of lists.

The lists and all correspondence relative thereto shall be protected to prevent inspection of contents by personnel who are not required to have access to such information. The lists shall be marked "For Official Use Only."

§ 1.609–4 Maintenance and distribution of lists.

The lists shall be kept current by issuance of notices of additions or deletions and by periodic reprinting. Copies of the list shall be distributed to contracting officers as the unified commanders and their component commanders direct. CINCEUR, CINCPAC, and CINCARIB will exchange lists directly. Copies will also be furnished to the Assistant Secretary of Defense (Supply and Logistics), the Assistant Secretary of Defense (International Security Affairs), the Assistant Secretary of the Army (Logistics) (Assistant Judge Advocate General), the Chief of Naval Material (Code M22), and the Commander, Air Material Command (MCPI).

§ 1.609–5 [Reserved]

§ 1.609–6 Basis of addition of firms and individuals on lists.

In addition to the names of offshore firms or individuals which may be included on the lists as falling into the categories outlined in § 1.603, the names of firms or individuals abroad shall be included on the list in the following additional categories:

(a) Those who are "designated nationals" under the Foreign Assets Control Regulations;

(b) Those found by the Assistant Secretary of Defense (ISA) or his authorized representative to have engaged in improper East-West trade activity;

(c) Those found by the Assistant Secretary of Defense (ISA) or his authorized representative to be ineligible because they do not meet the political or security criteria;

(d) Those found by a United States Diplomatic Mission or a Country Team (consisting of members of the United States Diplomatic Mission in the country or countries in which the firms or individuals are located) to be ineligible because they do not meet the labor-political criteria; and

(e) Those who for other causes of a serious and compelling nature are so designated by the unified commander.

§ 1.609–7 Treatment to be accorded firms or individuals in debarred or ineligible status.

The provisions of § 1.603 will be complied with, if applicable. In addition, contracts will not be awarded to, nor shall bids or proposals be solicited from, or furnished to firms or individuals abroad which come into the categories (a) through (e) of § 1.609–6. With respect to (a) of § 1.609–6, an exception may be made by the Secretary of the Treasury only. With respect to (b), (c), and (d) of § 1.609–6, an exception may be made by the Assistant Secretary of Defense (ISA) or his authorized representative.

§ 1.609–8 Causes and conditions under which unified commanders may place names on the consolidated list.

CINCEUR, CINCPAC, and CINCARIB, or their designated component commanders are respectively authorized to place on the list names of firms or individuals doing business within the areas for which they are responsible, for any of the causes and under the conditions set forth in §§ 1.609–6 and 1.609–7. Overseas commanders or unified commanders overseas other than CINCEUR, CINCPAC, and CINCARIB are similarly authorized to designate firms or individuals in their command areas and will promptly notify either CINCEUR, CINCPAC, or CINCARIB, who will add the names to their consolidated lists. In these cases the information contained in § 1.609–2 will be furnished. The listing shall operate to deny contracts to such firms or individuals throughout the Department of Defense.

§ 1.609–9 Liaison with United States diplomatic missions.

The Chief of the United States Diplomatic Mission, or such attaché or other officer as he directs, in the country where the firm or individual concerned is located, will be notified of actions contemplated under the foregoing sections which may have important political significance. In such cases of contemplated action against a branch or subsidiary firm or agency in one or more countries, the Chief of the United States Diplomatic Mission in each country, including that in which the parent or principal is located, will be notified.

§ 1.610 Use of overseas lists within United States.

(a) Due to the length of the lists, the numerous revisions and distances involved, as well as the infrequent contracting by offices in the United States with offshore supplies, the CINCEUR, CINCPAC, and CINCARIB consolidated lists of ineligible, debarred and suspended bidders will not be distributed to contracting officers in the United States. However, no contracts will be awarded by contracting officers in the United States, and its possessions, to offshore suppliers without ascertaining that the names of the firms or individuals involved do not appear on the overseas consolidated lists. These lists will be held for reference in each of the Military Departments and will be utilized in accordance with procedures established by each of the Departments.

(b) Where a contracting officer becomes aware that a prospective contractor proposes to furnish products of a concern that has been placed on an overseas list in accordance with § 1.609–b (a), (b), (c), or (d), the matter shall, in accordance with Departmental procedures, be referred to the Assistant Secretary of Defense (ISA) for advice. In the Army, referral will be through the Assistant Secretary of the Army (Logistics) (Assistant Judge Advocate General) with an information copy to the Deputy Chief of Staff for Logistics, Attn: Chief, Contracts Branch; in the Navy, through the Office of Naval Material—Code M–30; in the Air Force, through Headquarters USAF, AFMPP–PR.

Subpart G—Small Business Concerns

§ 1.700 Scope of subpart.

To implement the Small Business Act, Pub. Law 85–536, and the Armed Services Procurement Act, as amended, this subpart sets forth (a) policy with reference to small business concerns, (b) policy governing relationship with the Small Business Administration, (c) small business set-aside procedures, and (d) the Defense Small Business Subcontracting Program. This subpart applies only in the United States, its Territories, its possessions, and Puerto Rico.

§ 1.701 Definitions.

As used throughout this subpart, the following terms shall have the meanings set forth below.

§ 1.701–1 Small business concern.

(a) (1) *General definitions.* Except as provided in subparagraph (2) of this paragraph, a small business concern is a concern that is (i) independently owned and operated, is not dominant in its field of operation and, with its affiliates, employs fewer than 500 employees, or (ii) is certified as a small business concern by SBA.

(2) *Special industry definitions.* Unless certified as a small business concern by SBA, in addition to being independently owned and operated, and not dominant in its field of operation, a small business concern in order to qualify as such must meet special criteria in the following industries:

(i) *Construction industry.* In the construction industry, the average annual receipts of the concern and its affiliates for the preceding three years must have been $5,000,000 or less; except that if the concern is located in Alaska, such receipts must have been $6,250,000 or less.

(ii) *Aircraft equipment and parts industry.* In the aircraft equipment and parts industry, the number of employees of the concern and its affiliates must not exceed 1,000 employees. This special definition for the aircraft equipment and parts industry applies only in the procurement of the following items:

Airframes and structural components.
Aircraft propellers and hubs.
Wheel and brake systems.
Jet engines.
Fuel tanks.
Aircraft hydraulic systems.
Aircraft vacuum systems.
Aircraft air-conditioning.
Heating and pressurizing equipment.
Fire control systems.
Flight instruments.
Flight simulators (except small cockpit trainers).
Aircraft de-icing systems.

(iii) *Petroleum refining industry.* In the petroleum refining industry, the concern and its affiliates must employ not more than 1,000 employees and not have more than 30,000 barrels per day crude oil capacity from owned or leased facilities.

(iv) *Food, canning, and preserving industry.* In the food, canning and preserving industry, the concern and its affiliates must employ fewer than 500 employees exclusive of "agricultural labor" as defined in 26 U.S.C. 3306(k).

(v) *Air transportation industry.* In the air transportation industry the number of employees of the concern and its affiliates must not exceed 1,000 employees.

(b) *Dominance in field of operations.* A concern "is not dominant in its field of operations" when it does not exercise a controlling or major influence in an area of business activity. In determining whether dominance exists, consideration is given to all appropriate factors including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents and license agreements, sales territory, and business activity.

(c) *Affiliates.* Business concerns are affiliates of each other when either directly or indirectly (1) one concern controls or has the power to control the other, or (2) a third party controls or has the power to control both. In determining whether concerns are independently owned and operated and whether or not affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships.

(d) *Number of employees.* In connection with the determination of small business status, except as SBA otherwise determines in a particular industry or part thereof, "number of employees" means the average employment of any concern and its affiliates based on the number of persons employed during the pay period ending nearest the 15th of the third month in each calendar quarter for the preceding four quarters. If a concern has not been in existence for four full calendar quarters, "number of employees" means the average employment of such concern and its affiliates during the period such concern has been in existence based on the number of persons employed during the pay period ending nearest the 15th of each month.

(e) *Small business certificate.* A small business certificate is a certificate issued by SBA pursuant to the authority contained in sections 3 and 8(b)(6) of the Small Business Act certifying that the holder of the certificate is a small

business concern for the purpose of Government procurement and in accordance with the terms of the certificate.

§ 1.701–2 Established supplier.

An "established supplier" of an item is a concern which is a "source of supplies," within the meaning of § 1.201–18, and which has supplied the items satisfactorily to one or more military departments, or a concern with which mobilization planning is in effect.

§ 1.701–3 Potential supplier.

A "potential supplier" of an item is a concern which is a "source of supplies," within the meaning of § 1.201–18, but which is not an established supplier.

§ 1.701–4 Regular dealer (nonmanufacturer) as small business concern.

One who submits bids or offers in his own name, but who proposes to furnish a product not manufactured by himself, shall be deemed to be a small business concern only if (a) he is a small business concern within the meaning of § 1.701–1; (b) he is a regular dealer (nonmanufacturer) (see § 1.201–18); and (c) in the case of a procurement set aside for small business (see § 1.706) or involving equal low bids (see § 2.407–6 of this subchapter) or otherwise involving the preferential treatment of small business, he agrees to furnish in the performance of the contract end items manufactured or produced in the United States, its possessions, or Puerto Rico, by small business concerns; provided, that this section does not apply to construction or service contractors.

§ 1.702 General policy.

(a) It is the policy of the Department of Defense to place a fair proportion of its total purchases and contracts for supplies and services (including, but not limited to, contracts for maintenance, repair, and construction) with small business concerns.

(b) Each military department shall implement this policy by affording small business concerns an equitable opportunity to compete for prime contracts in accordance with the following:

(1) bidders' mailing lists (see § 2.205 of this subchapter) shall be maintained and shall include all established and potential small business suppliers who have made acceptable application for inclusion or who appear from other information (including recommendation by the SBA representative), to be qualified for inclusion therein.

(2) Invitations for Bids or Requests for Proposals shall be sent to all firms on the appropriate list, except that where less than the complete list is to be used pursuant to § 2.205–4 of this subchapter a pro-rata number of established or potential small business suppliers shall be solicited;

(3) procurement of supplies and services shall be divided into reasonably small lots (not less than economic production runs) in order to permit bidding on quantities less than the total requirements; the maximum amount of time practicable shall be allowed for preparation and submission of bids and proposals; and delivery schedules shall be suitable for small business participation; and

(4) for specification requirements, see § 1.1203 (d) of this subchapter.

As to subcontracting, see § 1.707.

(c) Records of the total value of all contracts placed with small business concerns during each fiscal year, and reports based thereon, are maintained by each military department through the Department of Defense Procurement Reporting System described in § 1.110 and § 16.807 of this subchapter. Accordingly, each military department shall, in soliciting bids or proposals, request from any bidder or offeror, or other source, any information needed to determine whether the bidder or offeror is a small business concern.

§ 1.703 Determination of status as small business concern.

(a) Except as provided in paragraph (b) of this section, the contracting officer shall accept at face value (1) a small business certificate (see § 1.701–1 (e)) that a bidder or offeror is a small business concern or (2) a statement by the bidder or offeror that it is a small business concern (see §§ 1.701–1 and 1.701–4) and that it has not previously been denied small business status by SBA.

(b) Small business certificates and statements that a bidder or offeror is a small business concern shall be effective, even though questioned in accordance with the terms of this paragraph, unless the SBA, in response to such question and within the period specified in subparagraph (3) of this paragraph, determines that the bidder or offeror in question is not a small business concern.

(1) Any bidder or offeror may, prior to award, question the small business status of the apparently successful bidder or offeror by sending a written protest to the contracting officer and to the SBA Regional Office for the region in which the questioned bidder or offeror has its principal place of business. SBA will promptly notify the contracting officer of the date of its receipt of any such protest and will advise the questioned bidder or offeror that its small business status is under review.

(2) A contracting officer may, prior to award, question the small business status of the apparently successful bidder or offeror by sending a written notice to the SBA Regional Office for the region in which the bidder or offeror has its principal place of business. Such notice shall contain a statement of the basis for questioning and of available supporting facts. SBA will promptly notify the contracting officer of the date such notice was received and will advise the bidder or offeror in question that its small business status is under review.

(3) SBA will determine the small business status of the questioned bidder or offeror and notify the contracting officer and the bidder or offeror of its decision. If the SBA determination is not received by the contracting officer within ten working days after SBA's receipt of the protest or notice questioning small business status, it shall be presumed that the questioned bidder or offeror is a small business concern. Pending SBA determination or expiration of the ten day period, whichever is earlier, procurement action shall be suspended.

§ 1.704 Small business officials.

§ 1.704–1 Director for small business.

The Director for Small Business for the Department of Defense advises the Assistant Secretary of Defense (Supply and Logistics) in matters relating to the establishment, implementation, and execution of an appropriate Small Business Program within the Department of Defense. Negotiations with SBA or other Government agencies or departments outside the Department of Defense concerning small business policy and programs shall be conducted through the Director for Small Business or with his authorization.

§ 1.704–2 Departmental small business advisors.

Each military department shall maintain an Office of Small Business for the Department. The Chief of each Office of Small Business shall devote his efforts exclusively to small business matters. He advises the Secretary on small business matters and is responsible for implementing the Department of Defense Small Business Program within his Department and for representing his Department in negotiations with other military departments or governmental agencies on small business matters.

§ 1.704–3 Small business specialists.

Small business specialists shall be appointed in each principal procurement office and such other offices as the military departments may consider appropriate. They will perform such functions as are prescribed for them in furtherance of the Small Business Program.

§ 1.705 Cooperation with the Small Business Administration.

§ 1.705–1 General.

The Assistant Secretary of Defense (Supply and Logistics) and the Administrator, SBA, are responsible for consulting, and cooperating in establishing policies and programs for small business participation in Defense procurement. All Department of Defense purchasing activities are responsible for working with SBA in carrying out these policies and programs, in accordance with the provisions of § 1.705.

§ 1.705–2 SBA representatives.

SBA may assign one or more representatives on a full- or part-time basis to any purchasing activity of the military departments to act in its behalf in carrying out SBA policies and programs.

§ 1.705–3 Screening of procurements.

(a) *Individual set-asides.* (1) SBA representatives, when properly authorized and cleared for security, shall, upon request, be afforded an opportunity at the purchasing activity to review all proposed classified and unclassified Invitations for Bids and Requests for Proposals unless both (i) it is anticipated that the resulting contract or contracts will not exceed $10,000 and (ii) the Head of the Purchasing Activity determines that

such review would unduly delay the procurement process. Where it is anticipated that the resulting contract or contracts will exceed $10,000, such SBA representative shall, upon request, be afforded an opportunity to make recommendations concerning Invitations for Bids and Requests for Proposals, including that they be exclusively or partially set aside for small business concerns. Where the Invitations for Bids or Requests for Proposals are reviewed by an SBA representative and it is anticipated that the resulting contract or contracts will not exceed $10,000, and if the Head of the Purchasing Activity approves, a similar opportunity to make recommendations will be afforded to the SBA representative.

(2) In any case, the contracting officer shall afford the SBA representative an opportunity to recommend, within a reasonable time, appropriate names of small business concerns for inclusion in the list of bidders or firms to be solicited in connection with a particular procurement.

(b) *Class set-asides.* (1) SBA representatives shall also be afforded an opportunity to make recommendations that current and future procurements, or portions thereof, of selected items or services or groups of like items or services shall be set aside, as provided in § 1.706, for exclusive small business participation. Such set-asides, when approved by the contracting officer, shall be known as class set-asides.

(2) SBA representatives, upon request, shall be furnished such available or reasonably obtainable information as may be required for the SBA to determine whether or not to recommend a class set-aside.

§ 1.705–4 Access to bidders' lists and other information.

SBA representatives, upon request, shall be permitted to review, inspect, study, and transcribe information from bidders' mailing lists (see § 1.702 (b)) and will be furnished such other available or reasonably obtainable information as may be required for the SBA referral program or for determination of whether small business concerns are proportionately represented on one or more particular bidders' mailing lists.

§ 1.705–5 Joint SBA-Defense small business set-aside program.

The Joint SBA-Defense Small Business Set-Aside Program, set forth in § 1.706, was developed by SBA and the Department of Defense to increase small business participation in Defense procurement. All press releases, reports, or other references to this program or to set-asides thereunder should refer to it as a Joint SBA-Defense Program and should avoid drawing any distinction between set-asides based on proposals of SBA representatives and those made independently of such proposals.

§ 1.705–6 Certificates of competency.

(a) SBA has statutory authority to certify the competency of any small business concern as to capacity and credit. "Capacity" means the overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, "know-how," technical equipment, and facilities. Contracting officers shall accept SBA certificates of competency as conclusive of a prospective contractor's responsibility as to capacity (see §§ 1.903–1 and 1.903–2) and credit (see § 1.903–1(b)): *Provided*, That if the contracting officer has substantial doubts as to the firm's ability to perform he shall, prior to award, refer the matter to higher authority in accordance with procedures of the Department concerned. In such cases SBA may be requested to consider withdrawal of the certificate and, in any event, the contracting officer will be informed of the final decision of SBA which shall be conclusive.

(b) If a small business concern has submitted an otherwise acceptable bid or proposal but has been found by the contracting officer to be nonresponsible as to capacity or credit, and if the bid or proposal is to be rejected for this reason alone, (i) SBA shall be notified of the circumstances so as to permit it to issue a certificate of competency, and (ii) award shall be withheld pending either SBA issuance of a certificate of competency or the expiration of ten working days after SBA is so notified, whichever is earlier, subject to the following:

(1) This procedure is not mandatory where the contracting officer certifies in writing that award must be made without delay and includes in the contract file a statement signed by him which justifies the certificate.

(2) This procedure does not apply to proposed awards of not more than $2,500.

(3) This procedure is optional, within the discretion of the contracting officer, as to proposed awards of more than $2,500, but less than $10,000.

(4) This procedure does not apply where the contracting officer has found a small business concern nonresponsible for a reason other than lack of capacity or credit. Thus, it does not apply where a concern does not satisfy the criteria of responsibility in § 1.903–1 (a), (e), (f), and (g). Where the contracting officer determines that a concern does not meet the requirements of §1.903–1(d) as to a satisfactory record of performance, the procedure is mandatory only if the unsatisfactory record of performance was due solely to inadequate capacity or credit. However, if the contracting officer has any doubt as to whether the unsatisfactory record of performance can reasonably be attributed solely to lack of capacity or credit, the matter shall be discussed with the local SBA representative. If the local SBA representative is of the opinion that the unsatisfactory record of performance is attributable solely to a lack of capacity or credit, and the contracting officer disagrees, the contracting officer shall, in accordance with Departmental procedures, forward the matter to higher authority within his Department for resolution. The decision of such higher authority shall be final. To assist SBA in determining the capacity and credit of small business concerns involved in a particular procurement, the purchasing activity shall make available to SBA all pertinent data, including technical and financial information, with respect to the small business concern involved.

(c) In procurements where the highest competence obtainable or the best scientific approach is needed, such as in certain negotiated procurements of research and development, highly complex equipment, or personal or professional services, the certificate of competency procedure is not applicable to the selection of the source offering the highest competence obtainable or the best scientific approach. However, if a small business concern has been selected on the basis of the highest competence obtainable or best scientific approach and, prior to award, the contracting officer determines that the concern is not responsible because of lack of capacity or credit, the certificate of competency procedure in paragraph (b) of this section is applicable.

§ 1.705–7 Performance of contract by SBA.

In accordance with section 8a of the Small Business Act, in any case in which the Administrator of SBA certifies to the Secretary concerned that SBA is competent to perform any specific contracts, the contracting officer is authorized, in his discretion, to award the contract to SBA upon such terms and conditions, consistent with this Regulation, as may be agreed upon between SBA and the contracting officer.

§ 1.706 Set-Asides for small business.

§ 1.706–1 General.

(a) Subject to any applicable preference for labor surplus area set-asides as provided in § 1.803(a)(2) of this part, any individual procurement or class of procurements or an appropriate part thereof, shall be set aside for the exclusive participation of small business concerns when such action is (1) jointly determined by an SBA representative and the contracting officer, or (2) if no SBA representative is available, is unilaterally determined by the contracting officer to be in the interest of maintaining or mobilizing the Nation's full productive capacity, or in the interest of war or national defense programs, or in the interest of assuring that a fair proportion of Government procurement is placed with small business concerns. Insofar as practical, joint determinations shall be used as a basis for set-asides rather than unilateral determinations; but the impracticability of obtaining a joint determination should not be treated as an obstacle to making a set-aside based on a unilateral determination in an otherwise appropriate case.

(b) Procurements involving supplies of mutual interest to the United States and Canada which have been developed and financed by the Government of Canada shall not be set aside for small business.

§ 1.706–2 Review of SBA set-aside proposals.

(a) (1) Upon a recommendation of an SBA representative that an individual procurement or class of procurements, or portion thereof, be set aside for small business, the contracting officer shall promptly either (i) concur in the recommendation, or (ii) disapprove, stating in writing his reasons for disapproval. The SBA representative shall be allowed two working days to appeal any such disapproval to the head of the purchasing activity or his designee for decision. During consideration of such appeal there shall be full and free interchange of all pertinent facts between the SBA representative and the purchasing activity concerned. Within one working day after receipt of a decision of the head of the purchasing activity or his designee disapproving a recommended set-aside, the SBA representative may request the contracting officer to suspend any procurement actions affected by the recommended set-aside pending a further appeal by the Administrator of SBA to the Secretary of the Military Department concerned for determination. SBA shall be allowed seven working days after making any such request within which (*a*) the Administrator of SBA may appeal the decision of the head of the purchasing activity or his designee to the Secretary concerned, and (*b*) to notify the contracting officer whether such appeal has in fact been taken. If such notification is not received by the contracting officer within the seven-day period, it shall be deemed that the SBA request to suspend procurement action has been withdrawn and that no appeal to the Secretary was taken. Where an appeal to the Secretary concerned has been taken and the contracting officer has been notified of that fact within the seven-day period, the head of the purchasing activity shall, in accordance with Departmental procedures, forward to the Secretary concerned a full justification of his decision.

(2) Any procurement action affected by a set-aside recommendation which has been disapproved by the contracting officer and appealed by the SBA representative shall be suspended pending the decision of the head of the purchasing activity or his designee. If the decision sustains the disapproval and if the SBA representative requests further suspension in accordance with subparagraph (1) of this paragraph the suspension shall continue until (i) the SBA appeal is deemed to have been withdrawn (as provided in subparagraph (1) of this paragraph) or (ii) the matter is determined by the Secretary of the Military Department concerned: *Provided,* That such suspension shall not apply to any particular procurement action which, as determined by the contracting officer, must, in order to protect the public interest, be initiated without delay and as to which he inserts in the contract file a statement signed by him justifying the determination. The contracting officer shall promptly notify the SBA representative of any procurement action initiated pursuant to the proviso of the preceding sentence.

(b) None of the following is, in itself, sufficient cause for not making a set-aside:

(1) A large percentage of previous procurements of the item in question has been placed with small business concerns;

(2) The item to be purchased is on an established planning list under the Industrial Readiness Planning Program; except that a total set-aside shall not be authorized when one or more large business Planned Emergency Producers of the item desire to participate in the procurement;

(3) The item to be purchased is on a Qualified Products List; except that a total set-aside shall not be authorized when the products of one or more large businesses are on the Qualified Products List unless it has been confirmed that none of such large businesses desires to participate in the procurement;

(4) A period of less than thirty days from date of issuance of invitations for bids or requests for proposals is prescribed for the submission of the bids or proposals;

(5) The procurement is classified;

(6) Small business concerns are receiving a fair proportion of the total tracts for supplies or services; or

(7) A class set-aside of the item or service concerned has been made at some other purchasing activity.

(c) In approving a proposed class set-aside, the contracting officer shall make sure that the set-aside determination (1) specifically identifies the items or services subject thereto, (2) provides that it will, at least once each year, be reviewed jointly by an SBA representative and the contracting officer to determine whether it should be withdrawn (see § 1.706–3 for withdrawal procedure), (3) provides that it does not apply to any individual procurement for which small purchase procedures are to be used, and (4) provides that such class set-aside applies only to the purchasing activity making or participating in the set-aside determination. Any class of procurements proposed to be totally set aside shall satisfy the requirements of § 1.706–5(a). With respect to any class of procurements proposed to be partially set aside, the set-aside determination shall specify that it is not applicable to any individual procurement which is not severable into two or more economic production runs or reasonable lots.

§ 1.706–3 Withdrawal or modification of set-asides.

(a) Each individual procurement governed by a class set-aside shall be carefully reviewed to ensure that any changes in the magnitude of anticipated requirements, specifications for the items or services, delivery requirements, or competitive market conditions, since the initial approval of the class set-aside, are not of such material nature as to result in the probable payment of an unreasonable price by the Government or in a change in small business capability.

(b) (1) If, prior to the award of a contract involving an individual or class set-aside for small business, the contracting officer considers that procurement of the set-aside from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price), the contracting officer may withdraw a unilateral set-aside determination or initiate the withdrawal of a joint set-aside determination. Similarly, a class set-aside may be modified so as to withdraw one or more individual procurements therefrom. In the case of a joint set-aside determination, if the SBA representative does not agree to a withdrawal or modification, the SBA representative shall be allowed two working days to appeal the matter to the head of the purchasing activity or his designee for decision. Within one working day after receipt of a decision of the head of the purchasing activity or his designee approving such a withdrawal or modification, the SBA representative may request the contracting officer to suspend any procurement actions which would be affected by the withdrawal or modification pending a further appeal by the Administrator of SBA to the Secretary of the Military Department concerned for determination. SBA shall be allowed seven working days after making any such request within which (i) the Administrator of SBA may appeal the decision of the head of the purchasing activity or his designee to the Secretary concerned, and (ii) to notify the contracting officer whether such an appeal has in fact been taken. If such notification is not received by the contracting officer within the seven-day period, it shall be deemed that the SBA request to suspend procurement action has been withdrawn and that no appeal to the Secretary was taken. Where an appeal to the Secretary concerned has been taken and the contracting officer has been notified of that fact within the seven-day period, the head of the purchasing activity shall, in accordance with Departmental procedures, forward to the Secretary concerned a full justification of his decision.

(2) Any procurement action affected by a proposed withdrawal or modification which has been appealed by the SBA representative shall be suspended pending the decision of the head of the purchasing activity or his designee. If the decision sustains the withdrawal or modification, and if the SBA representative requests further suspension in accordance with subparagraph (1) of this paragraph, the suspension shall continue until (i) the SBA appeal is deemed to have been withdrawn (as provided in subparagraph (1) of this paragraph) or (ii) the matter is determined by the Secretary of the Military Department concerned: *Provided,* That such suspension shall not apply to any particular procurement action which, as determined by the contracting officer, must, in order to protect the public interest, be initiated without delay and as to which he inserts in the contract file a statement signed by him justifying the determination. The contracting officer shall promptly notify the SBA representative of any procurement action initiated pursuant to the proviso of the preceding sentence.

(3) A signed memorandum of any withdrawal or modification shall be made and retained.

§ 1.706–4 Reporting for Department of Commerce procurement synopsis.

See § 1.1003–4.

§ 1.706–5 Total set-asides.

(a) Subject to any applicable preference for labor surplus area set-asides as provided in § 1.803(a)(2), the entire amount of an individual procurement or class of procurements (including but not limited to contracts for maintenance, repair, and construction) shall be set aside for exclusive small business participation (see § 1.706–1) where there is a reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices. Total set-asides shall not be made unless such a reasonable expectation exists; however, see § 1.706–6 as to partial set-asides.

(b) Contracts for total small business set-asides may be entered into by conventional negotiation or by a special method of procurement known as "Small Business Restricted Advertising." The latter method shall be used wherever possible. Invitations for Bids and Requests for Proposals shall be restricted to small business concerns. Small Business Restricted Advertising, including awards thereunder, shall be conducted in the same way as prescribed for formal advertising in Part 2 of this subchapter, except that bids and awards shall be restricted to small business concerns.

(c) In procurements involving total set-asides for small business, each Invitation for Bids or Request for Proposals shall contain substantially the following notice:

NOTICE OF SMALL BUSINESS SET-ASIDE

Bids or proposals under this procurement are solicited from small business concerns only and this procurement is to be awarded only to one or more small business concerns. This action is based on a determination by the contracting officer, alone or in conjunction with a representative of the Small Business Administration, that it is in the interest of maintaining or mobilizing the Nation's full productive capacity, in the interest of war or national defense programs, or in the interest of assuring that a fair proportion of government procurement is placed with small business concerns. A small business concern is a concern that:

(i) Is independently owned and operated, is not dominant in its field of operation and, with its affiliates, employs fewer than 500 employees, or

(ii) Is certified as a small business concern by the Small Business Administration. In addition to meeting these criteria, a manufacturer or a regular dealer submitting bids or proposals in his own name must agree to furnish in the performance of the contract end items manufactured or produced in the United States, its possessions, or Puerto Rico, by small business concerns; provided, that this additional requirement does not apply in connection with construction or service contracts. Bids or proposals received from firms which are not small business concerns shall be considered nonresponsive.

Where the definition of a small business concern for a given industry, as prescribed by the Small Business Administration and promulgated by the Departments, differs from that set forth in the notice above, the notice shall be appropriately modified to reflect such definition. For construction contracts, (i) and (ii) of the foregoing notice and the first sentence following (ii) of the notice should be deleted and the following substituted therefor:

(i) Is independently owned and operated;
(ii) Is not dominant in its field of operation; and
(iii) The average annual receipts of the concern and its affiliates for the preceding three years are $5,000,000 or less.

§ 1.706–6 Partial set-asides.

(a) Subject to any applicable performance for labor surplus area set-asides as provided in § 1.803(a)(2), a portion of a procurement (including but not limited to contracts for maintenance, repair, and construction) shall be set aside for exclusive small business participation (see § 1.706–1) where:

(1) The procurement is not appropriate for total set-aside pursuant to § 1.706–5;

(2) The procurement is severable into two or more economic production runs or reasonable lots; and

(3) Two or more small business concerns are expected to have the technical competency and productive capacity to furnish a severable portion of the procurement at a reasonable price.

Similarly, a class of procurements (including but not limited to contracts for maintenance, repair, and construction) may be partially set aside in accordance with § 1.706–2(c).

(b) Where a portion of a procurement is to be set aside for small business pursuant to paragraph (a) of this section, the procurement shall be divided into a set-aside portion and a non-set-aside portion, each of which shall be not less than an economic production run or reasonable lot. Insofar as practical, the set-aside portion will be such as to make the maximum use of small business capacity. Delivery and other terms applicable to the set-aside portion of an item and those applicable to the non-set-aside portion of that item shall be comparable.

(c) In advertised procurements involving partial set-asides for small business, Invitations for Bids shall contain either substantially the following notice or the notice set forth in paragraph (d) of this section. In negotiated procurements, whichever notice is used will be appropriately modified for use with requests for proposals.

NOTICE OF SMALL BUSINESS SET-ASIDE

A portion of this procurement, as identified elsewhere in the Schedule, has been set aside for award only to one or more small business concerns. Negotiations for award of this set-aside portion will be conducted only with responsible small business concerns who have submitted responsive bids on the non-set-aside portion at a unit price within 120 percent of the highest award made on the non-set-aside portion. Negotiations shall be conducted with such small business concerns in the order of their bids on the non-set-aside portion beginning with the lowest responsive bid. The set-aside shall be awarded at the highest unit price awarded on the non-set-aside portion, adjusted to reflect transportation and other cost factors which were considered in evaluating bids on the non-set-aside portion. However, the Government reserves the right not to consider token bids or other devices designed to secure an unfair advantage over other bidders eligible for the set-aside portion. The partial set-aside of this procurement for small business concerns is based on a determination by the Contracting Officer, alone or in conjunction with a representative of the Small Business Administration, that it is in the interest of maintaining or mobilizing the Nation's full productive capacity, or in the interest of war or national defense programs, or in the interest of assuring that a fair portion of Government procurement is placed with small business concerns. A small business concern is a concern that:

(i) Is certified as a small business concern by the Small Business Administration, or

(ii) Is independently owned and operated, is not dominant in its field of operation and, with its affiliates, employs fewer than 500 employees.

In addition to meeting these criteria, a manufacturer or a regular dealer submitting bids or proposals in his own name must agree to furnish in the performance of the contract end items manufactured or produced in the United States, its possessions, or Puerto Rico, by small business concerns; provided that, this additional requirement does not apply in connection with construction or service contracts.

Where the definition of a small business concern for a given industry, as prescribed by the Small Business Administration and promulgated by the Departments, differs from that set forth in the notice in this paragraph, the notice shall be appropriately modified to reflect such definition.

(d) Where it is anticipated that bids may be received which appear designed to take unfair advantage of bona fide bidders, by devices such as unrealistically low bids on mere token quantities, the notice set forth below may be used instead of that in paragraph (c) of this section.

NOTICE OF SMALL BUSINESS SET-ASIDE

(a) *General.* This procurement has been divided into two parts. All concerns, whether small business or not, may participate in accordance with customary procedures in that portion of this procurement herein called the "non-set-aside" portion. The quantities of the non-set-aside portion are set forth elsewhere in this Schedule. The other portion of the items to be procured has been set aside for participation by small business concerns. This is called the "set-aside portion" and awards therefor are made in accordance with special procedures set forth in paragraph (c) of this Notice. This apportionment is based on a determination by the Contracting Officer, alone or in conjunction with a representative of the Small Business Administration, that it is in the interest of maintaining or mobilizing the Nation's full production capacity, or in the interest of war or national defense programs, or in the interest of assuring that a fair proportion of Government procurement is placed with small business concerns. "Small business concern" is defined in paragraph (d) of this Notice.

(b) *Non-set-aside portion and award procedure.*

(1) A bidder which is not a small business concern shall submit a bid only for the non-set-aside portion of the procurement. Award thereof will be made in accordance with customary procedures.

(2) A bidder which is a small business concern and is interested in receiving an award for a quantity of an Item not exceeding the quantity set forth in the non-set-aside portion of the procurement, should submit a

bid in the same manner as other concerns bidding only on the non-set-aside portion. If such a bidder is interested in receiving an award for a quantity of an Item in addition to the quantity set forth in the non-set-aside portion, it must bid the entire quantity of the non-set-aside portion of the Item, and indicate such additional quantity of the Item as it desires by so specifying on the Addendum to this Notice. Thus, the Notice Addendum is not to be used unless the bidder has bid the entire quantity of an Item under the non-set-aside portion.

However, a small business concern which receives no award, or receives an award for less than the total quantity of an Item for which it submitted a bid under the non-set-aside portion, may be eligible for an award of the quantity it bid, or the unawarded quantity thereof, under the following procedure governing the set-aside portion.

(c) *Set-aside portion and award procedure.* Award of the set-aside portion of this procurement will be made after award has been completed on the non-set-aside portion. It will be made only to small business concerns which are found to be eligible in accordance with (1) below; on the basis of priorities for award set forth in (2) below; for quantities as provided in (3) below; and at prices determined in accordance with (4) below.

(1) *Eligibility.* To be eligible for consideration for the set-aside portion of an Item, the small business concern must have submitted a responsive bid on such Item in accordance with the requirements of (b)(2) above at a unit price no greater than 120 percent of the highest unit price for such Item awarded under the non-set-aside portion. However, see (5) below when separate quantities are offered at different prices and see (6) below when separate quantities are offered at tie-in prices.

(2) *Priorities.* Negotiations for the set-aside portion will be made to eligible concerns in the order of their bids on the non-set-aside portion, beginning with the lowest responsive bid. However, see (5) below for the method of determining the bid when separate quantities are offered at different prices and see (6) below when separate quantities are offered at tie-in prices.

(3) *Quantity.* The quantity of the set-aside portion of an Item which may be awarded to an eligible concern shall be as follows:

(A) As to an eligible concern which has not specified on the Notice Addendum a quantity of the set-aside portion of the Item which it desires in addition to the entire non-set-aside portion thereof, the quantity shall be no greater than the quantity of such concern's bid on the non-set-aside portion of that Item, less the quantity, if any, of that Item awarded to that concern under the non-set-aside portion.

(B) As to an eligible concern which has submitted a bid for the entire non-set-aside portion of the item and has specified on the Notice Addendum a quantity of the set-aside portion of that Item which it desires in addition to the entire non-set-aside portion thereof, the quantity shall be no greater than the total of the entire non-set-aside portion of the Item and the quantity thereof specified on the Notice Addendum, less the quantity, if any, of that Item awarded to that concern under the non-set-aside portion.

(4) *Price.* The set-aside shall be awarded at the highest unit price awarded on the non-set-aside portion, adjusted to reflect transportation and other cost factors which were considered in evaluating bids on the non-set-aside portion. However, see (6) below for the highest unit price when the highest award is made on separate quantities at tie-in prices.

(5) *Separate quantities at different prices.* Where a concern has submitted a bid for separate quantities of the non-set-aside portion of an Item at different prices, without conditioning the Government's right to accept one or more such quantities upon its concurrent acceptance of another quantity of the Item, each separate quantity shall be considered as a separate bid for the purpose of determining the eligibility of the concern with respect to the 120 percent limit prescribed in (c)(1) above, and for the purpose of determining under (c)(2) above the standing of that bid in the order of negotiations for the set-aside portion of that Item.

(6) *Separate quantities at tie-in prices.* Where a concern has submitted a bid for separate quantities of the non-set-aside portion of an Item at different prices, and has conditioned the Government's right to accept any one or more of such quantities upon its concurrent acceptance of another quantity of the Item, the weighted average of the prices for such conditioned quantities shall be considered the unit price for the purpose of determining, with respect to such conditioned quantities, (i) the eligibility of the firm with respect to the 120 percent limit of (c)(1) above, (ii) the priority status of the firm under (c)(2) above, and (iii) the highest unit price for awards under (c)(4) above if the highest award on the non-set-aside portion was made on such conditioned bid.

(d) *Definitions.* A "small business concern" is a concern that (i) is certified as a small business concern by the Small Business Administration, or (ii) is independently owned and operated, is not dominant in its field of operation and, with its affiliates, employs fewer than 500 employees.

In addition to meeting these criteria, a manufacturer or a regular dealer submitting bids or proposals in his own name must agree to furnish in the performance of the contract end items manufactured or produced in the United States, its possessions, or Puerto Rico, by small business concerns; provided that, this additional requirement does not apply in connection with construction or service contracts.

(e) *Token bids.* Notwithstanding the provisions of this Notice, the Government reserves the right, in determining eligibility or priority for set-aside negotiations, not to consider token bids or other devices designed to secure an unfair advantage over other bidders eligible for the set-aside portion.

(f) *Instruction for Use, and Explanation of, Notice Addendum.* The quantity of each item which has been set aside is set forth on the attached Notice Addendum. As provided in (b)(2), the Notice Addendum is to be filled in only by small business concerns. Furthermore, it is to be used by such a concern only when (i) it has submitted a bid for the entire non-set-aside quantity of an Item, and (ii) it desires a total quantity in excess of the non-set-aside quantity thereof. Whether or not a small business concern may participate in the set-aside portion is dependent on its eligibility in accordance with paragraph (c) above. It should be noted, however, that to be eligible for the set-aside portion it need not have filled in the Notice Addendum. The latter should only be filled in where the concern desires a quantity in excess of the quantity set forth in the Schedule.

NOTICE ADDENDUM FOR SET-ASIDE

The quantity of each Item which has been set aside is as follows:

1 Item No.	2 Quantity set-aside	3 Quantity desired

[The issuing office will identify by line item number the supplies being procured as to which a portion is set aside and will designate the quantity set aside for each such item. The quantity desired column will be left blank for the bidder or offerer to fill in. Where the definition of a small business concern for a given industry, as prescribed by the Small Business Administration and promulgated by the Departments, differs from that set forth in the notice above, the notice shall be appropriately modified to reflect such definition.]

(e) After all awards have been made on the non-set-aside portion, procurement of the set-aside portion shall in all instances be effected by negotiation. Negotiations shall be conducted only with those bidders or offerors who have submitted responsive bids or proposals on the non-set-aside portion at a unit price no greater than 120 percent of the highest award made on the non-set-aside portion and who are determined to be responsible prospective contractors for the set-aside portion of the procurement. Negotiations shall be conducted with such small business concerns in the order of their bids or proposals on the non-set-aside portion, beginning with the lowest responsive bid or proposal as indicated in the foregoing notice. Where equal low bids are received on the non-set-aside portion from concerns which are eligible for the set-aside portion, the concern which is awarded the non-set-aside portion (under the equal low bid procedures of § 2.407–6 of this subchapter) shall have first priority with respect to negotiations for the set-aside portion. The set-aside portion will be awarded at the highest unit price awarded for the non-set-aside portion.

§ 1.706–7 Automatic dissolution of set-asides.

If the entire set-aside portion is not procured by the method set forth in § 1.706–5, as to total set-asides, or in § 1.706–6, as to partial set-asides, the determination referred to in § 1.706–1, is automatically dissolved as to the unawarded portion of the set-aside and such unawarded portion may be procured by advertising or negotiation as appropriate in accordance with existing regulations (see § 3.201–2(b)(2) of this chapter as to negotiation).

§ 1.706–8 Contract authority.

Contracts for total or partial set-asides whether entered into by conventional negotiation (see §§ 1.706–5(b) and 1.706–6(e)) or by "Small Business Restricted Advertising" (see § 1.706–5(b)), shall cite as authority 10 U.S.C. 2304(a)(17) and Section 15 of the Small Business Act in the case of a joint determination, or 10 U.S.C. 2304(a)(1), in the case of a unilateral determination (see § 3.201–2(b)(2) of this chapter).

§ 1.706–9 Maintenance of records.

Records pertaining to the initiation of individual procurements under each class set-aside shall be maintained by individual purchasing activities. Such records shall include: IFB or RFP Number and Date: Item or Service; Unilateral or Joint Class Set-Aside and Number; Estimated Amount of Procurement; and Estimated Amount of Set-Aside. A copy of each such record shall be made available by each purchasing activity to SBA, upon request.

§ 1.707 Subcontracting.

§ 1.707–1 General policy.

It is the policy of the Department of Defense that small business concerns be afforded an equitable opportunity to compete for Defense subcontracts within their capabilities.

§ 1.707–2 Required clauses.

(a) The clause, "Utilization of Small Business Concerns," set forth in § 7.104–14, shall be included in all contracts in amounts exceeding $5,000 except—

(1) Contracts for services which are personal in nature; and

(2) Contracts which, including all subcontracts thereunder, are to be performed outside the United States, its Territories, its possessions, and Puerto Rico.

(b) The clause set forth in § 7.104–22, "Defense Subcontracting Small Business Program," shall be included in all contracts (except negotiated contracts with foreign concerns) in excess of $1,000,000 which contain the clause required by § 1.707–2(a) above and which, in the opinion of the purchasing activity, offer substantial subcontracting possibilities; except that this clause shall not be included in contracts for the construction, alteration, or repair of buildings, bridges, roads, or other kinds of real property. Prime contractors to be awarded contracts not in excess of $1,000,000, which in the opinion of the purchasing activity offer substantial subcontracting possibilities, should be urged to establish and conduct a "Defense Subcontracting Small Business Program," to accept the clause contained in § 7.104–22, and to follow the program described in § 1.707–3.

§ 1.707–3 Defense subcontracting in small business programs.

Each contractor having a prime contract which contains the clause set forth in § 7.104–22 shall be required to establish and conduct a "Defense Subcontracting Small Business Program" to include the following:

(a) Designate a small business liaison officer who will (1) maintain liaison with the purchasing activity and SBA in small business matters; (2) supervise compliance with the "Utilization of Small Business Concerns" clause; and (3) administer contractor's "Defense Subcontracting Small Business Program";

(b) Assure that small business concerns will have an equitable opportunity to compete for subcontracts, particularly by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate small business participation;

(c) Maintain records showing (1) whether each prospective subcontractor is a small business concern, and (2) procedures which have been adopted to comply with the policies set forth in this paragraph;

(d) Include the "Utilization of Small Business Concerns" clause in subcontracts which offer substantial small business subcontracting opportunities;

(e) Require subcontractors having subcontracts in excess of $1,000,000 which contain the clause entitled "Utilization of Small Business Concerns" to establish and conduct a "Defense Subcontracting Small Business Program;" and

(f) Submit such information on subcontracting to small business as is called for on DD Form 1140.

§ 1.707–5 Reports on DD Form 1140.

(a) In connection with the submission of DD Form 1140 Reports under the "Defense Subcontracting Small Business Program" clause, a subcontractor may contact the nearest military purchasing or contract administration activity and request advice as to the military department to which he should submit reports. The military purchasing or contract administration activity shall, through channels, submit such a request to the Small Business Advisor of the department concerned. The Small Business Advisor shall submit it to the Director for Small Business Policy of the Department of Defense for his determination in coordination with the Small Business Advisors of the military departments.

(b) Each military department shall forward to the Assistant Secretary of Defense (Comptroller), by March 15 and September 15, a copy of each DD Form 1140 received for the semiannual periods ending December 31 and June 30, respectively.

§ 1.707–4 Responsibility for reviewing subcontracting program.

Only one Military Department shall be responsible for reviewing a contractor's Defense Subcontracting Small Business Program. Such review shall be the responsibility of:

(a) The Military Department having industrial readiness planning responsibility at the plant where the contract is being performed; or

(b) If paragraph (a) of this section is inapplicable, the Military Department having "plant cognizance procurement" (see § 5.1100–2(b) of this chapter); or

(c) If neither paragraph (a) nor (b) of this section is applicable, the Military Department assigned the responsibility through coordinated action of the Director for Small Business Policy of the Department of Defense and the Small Business Advisors of the Military Departments.

The responsible Military Department will determine the adequacy of the contractor's "Defense Subcontracting Small Business Program," and bring any deficiencies to the attention of the contractor's Small Business Liaison Officer with an appropriate request for corrective action.

§ 1.708 Mobilization planning.

The policy of placing a fair proportion of purchases and contracts with small business concerns (see § 1.702 of this part) applies in the field of mobilization planning and each Military Department shall continually study its industrial readiness planning procedures to include the Small Business Program to the maximum practical extent.

Subpart H—Labor Surplus Area Concerns

§ 1.800 Scope of subpart.

This subpart sets forth Department of Defense procurement policy and procedures with respect to aiding areas of persistent or substantial labor surplus, hereinafter referred to as labor surplus areas, in the United States, its possessions, and Puerto Rico. This subpart implements Defense Manpower Policy No. 4 (Revised) 6 June 1960 (32 ACFR Chapter I).

§ 1.801 Definitions.

§ 1.801–1 Labor surplus area concern.

Labor surplus area concern includes:

(a) Persistent labor surplus area concerns which will perform or cause to be performed any contracts awarded to them as labor surplus area concerns substantially in "Areas of Substantial and Persistent Labor Surplus;" and

(b) Substantial labor surplus area concerns which will perform or cause to be performed any contracts awarded to them as labor surplus area concerns substantially in "Areas of Substantial Labor Surplus."

§ 1.801–2 Labor surplus area.

Labor surplus area means a geographical area which at the time of award is:

(a) Classified by the Department of Labor as an "Area of Substantial Labor Surplus" or as an "Area of Substantial and Persistent Labor Surplus" (herein referred to as an area of persistent labor surplus) and listed as such by that Department in conjunction with its bimonthly pubilcation "Area Labor Market Trends", or

(b) Not classified as in paragraph (a) of this section, but which is individually certified as an area of persistent or substantial labor surplus by the Department of Labor at the request of any prospective contractor.

§ 1.801–3 Small business concern.

Small business concern is defined in § 1.701.

§ 1.802 General policy.

Except as provided in § 1.806 with respect to depressed industries, it is the policy of the Department of Defense to aid labor surplus areas by placing contracts with labor surplus area concerns, to the extent consistent with procurment objectives and where such contracts can be awarded at prices no higher than those obtainable from other concerns, and by encouraging prime contractors to place subcontracts with concerns which will perform substantially in labor surplus areas. In carrying out this policy, to accomodate the small business policies of Subpart G of this part, preference shall be given in the following order of priority to (a) persistent labor surplus area concerns which are also small business concerns, (b) other persistent labor surplus area concerns, (c) substantial labor surplus area concerns which are also small business concerns, (d) other substantial labor surplus area concerns and (e) small business concerns which are not labor surplus area concerns. But in no case will price differentials be paid for the purpose of carrying out this policy.

§ 1.803 Application of policy.

(a) Within the policy set forth in § 1.802, the following shall be applied to procurements which are estimated to exceed $10,000:

(1) Negotiated procurements shall, where procurement objectives permit, be awarded to labor surplus area concerns: *Provided*, That in no case shall price differentials be paid for the purpose of carrying out this policy;

(2) Where appropriate, procurements shall be made from labor surplus area concerns by partial set-aside procedures, in accordance with § 1.804, and such set-asides shall be given preference over any small business set-aside (but no total set-aside shall be made for labor surplus area concerns);

(3) Each Department shall assure that information identifying labor surplus areas is disseminated promptly to procurement personnel;

(4) Department of Labor certification (see § 1.801–2(b) shall be considered conclusive with respect to the particular procurement concerned.

* * * * *

(5) Where less than a complete bidder's mailing list is to be used pursuant to § 2.205–4, a pro rata number of prospective contractors in labor surplus areas shall be solicited; and

(6) Subcontracting with concerns in labor surplus areas shall be encouraged in accordance with § 1.805.

(b) Records of the total value of all contracts in excess of $10,000 placed with labor surplus area concerns during each fiscal year, and reports based thereon, are maintained by each Department through the Department of Defense Reporting System described in §§ 1.110 and 16.807. Accordingly, each Department, in soliciting bids and proposals for any procurement estimated to exceed $10,000 shall request from any bidder or offeror, or other source, any information needed to determine whether the bidder or offeror is a labor surplus area concern. Contract files shall be documented to indicate the extent to which labor surplus area concerns were considered and the action taken with respect thereto.

§ 1.804 Partial set-asides for labor surplus area concerns.

§ 1.804–1 General.

(a)(1) In accordance with the policy set forth in §§ 1.802 and 1.803, a portion of each procurement shall be set aside for labor surplus area concerns if:

(i) The procurement is severable into two or more economic production runs or reasonable lots; and

(ii) Two or more labor surplus area concerns are expected to have the technical competency and productive capacity to furnish a severable portion of the procurement at a reasonable price.

(2) In furtherance of the policy to assure that a fair proportion of procurements is placed with small business concerns, each labor surplus area set-aside shall provide that, in addition to labor surplus area concerns, small business concerns not performing in such areas are also eligible for participation in the set-aside for such quantities thereof as are not awarded to labor surplus area concerns. (In this respect, see applicable provisions of § 1.804–2 (b) and (c), for notices to bidders or offerors, and § 1.804–2(d) for conduct of set-aside negotiations.)

(b) None of the following is, in itself, sufficient cause for not making a set-aside:

(1) A large part of previous procurements of the item in question has been placed with labor surplus area concerns;

(2) The item to be purchased is on an established planning list under the Industrial Readiness Planning Program;

(3) The item to be purchased is on a Qualified Products List;

(4) A period of less than thirty days from the date of issuance of invitations for bids or requests for proposals is prescribed for the submission of bids or proposals;

(5) The procurement is classified; or

(6) Labor surplus area concerns are receiving a fair proportion of contracts.

(c) Procurements involving supplies of mutual interest to the United States and Canada which have been developed and financed by the Government of Canada shall not be set aside for labor surplus areas.

§ 1.804–2 Set-aside procedures.

(a) Where a portion of a procurement is to be set aside pursuant to § 1.804–1, the procurement shall be divided into a non-set-aside portion and set-aside portion, each of which shall be not less than an economic production run or reasonable lot. Insofar as practical, the set-aside portion will be such as to make the maximum use of the capacity of labor surplus area concerns. Delivery terms and other terms applicable to the set-aside portion of an item and those applicable to the non-set-aside portion of that item shall be comparable.

(b) In advertised procurements involving set-asides pursuant to this subpart, each invitation for bids shall contain either substantially the following notice or the notice set forth in paragraph (c) of this section. In negotiated procurements, whichever notice is used will be appropriately modified for use with requests for proposals.

NOTICE OF LABOR SURPLUS AREA SET-ASIDE
(OCT. 1960)

A portion of this procurement, as identified elsewhere in the Schedule, has been set aside for award only to one or more labor surplus area concerns, and, to a limited extent, to small business concerns which do not qualify as labor surplus area concerns. Negotiations for award of the set-aside portion will be conducted only with responsible labor surplus area concerns (and small business concerns to the extent indicated below) who have submitted responsive bids or proposals on the non-set-aside portion at a unit price within 120 percent of the highest award made on the non-set-aside portion. Negotiations for the set-aside portion will be conducted with such bidders in the following order of priority:

Group 1. Persistent labor surplus area concerns which are also small business concerns.

Group 2. Other persistent labor surplus area concerns.

Group 3. Substantial labor surplus area concerns which are also small business concerns.

Group 4. Other substantial labor surplus area concerns.

Group 5. Small Business concerns which are not labor surplus area concerns.

Within each of the above groups, negotiations with such concerns will be in the order of their bids on the non-set-aside portion, beginning with the lowest responsive bid. The set-aside shall be awarded at the highest unit price awarded on the non-set-aside portion, adjusted to reflect transportation and other cost factors which were considered in evaluating bids on the non-set-aside portion. However, the Government reserves the right not to consider token bids or other devices designed to secure an unfair advantage over other bidders eligible for the set-aside portion.

Definitions

(1) A "labor surplus area" is a geographical area which at the time of award is:

(i) classified by the Department of Labor as an "Area of Substantial Labor Surplus" or as an "Area of Substantial and Persistent Labor Surplus" and listed as such by that Department in conjunction with its bi-monthly publication "Area Labor Market Trends"; or

(ii) not classified as in (i) above, but which is individually certified as an area of persistent or substantial labor surplus by the Department of Labor at the request of any prospective contractor.

(2) Labor surplus area concern includes:

(i) persistent labor surplus area concerns which will perform or cause to be performed any contracts awarded to them as labor surplus area concerns substantially in "Areas of Substantial and Persistent Labor Surplus"; and

(ii) substantial labor surplus area concerns which will perform or cause to be performed any contracts awarded to them as labor surplus area concerns substantially in "Areas of Substantial Labor Surplus."

(3) A "small business concern" is a concern that (i) is certified as a small business concern by the Small Business Administration, or (ii) is independently owned and operated, is not dominant in its field of operation and, with its affiliates, employs fewer than 500 employees. In addition to meeting these criteria, a manufacturer or regular dealer submitting bids or proposals in his own name must agree to furnish in the performance of the contract end items manufactured or produced in the United States, its possessions, or Puerto Rico, by small business concerns; provided that this additional requirement does not apply in connection with construction of service contracts. Where the definition of a small business concern for a given industry, as prescribed by the Small Business Administration and promulgated by the Departments, differs from that set forth in the notice above the notice shall be appropriately modified to reflect such definition.

Where the definition of a small business concern for a given industry, as prescribed by the Small Business Administration and promulgated by the Departments, differs from that set forth in the notice in this paragraph, the notice shall be appropriately modified to reflect such definition.

(c) Where it is anticipated that bids may be received which appear designed to take unfair advantage of bona fide bidders, by devices such as unrealistically low bids on mere token quantities, the notice set forth below may be used instead of that in paragraph (b) of this section.

NOTICE OF LABOR SURPLUS AREA SET-ASIDE
(OCT. 1960)

(a) *General.* This procurement has been divided into two parts. All concerns,

whether labor surplus area concerns or not, may participate in accordance with customary procedures in that portion of this procurement herein called the "non-set-aside" portion. The quantities of the non-set-aside portion are set forth elsewhere in this Schedule. The other portion of the items to be procured has been set aside for participation (i) by labor surplus area concerns, and (ii) to a limited extent, by small business concerns which do not qualify as labor surplus area concerns. This is called the "set-aside portion" and awards therefor are made in accordance with special procedures set forth in paragraph (c) of this Notice. Definitions of the following terms are set forth in paragraph (d) of this Notice:

(1) Labor Surplus Area
(2) Labor Surplus Area Concern
(3) Small Business Concern

(b) *Non-set-aside portion and award procedure.*

(1) A bidder which is not a labor surplus area concern or a small business concern shall submit a bid only for the non-set-aside portion of the procurement. Award thereof will be made in accordance with customary procedures.

(2) A bidder which is a labor surplus area concern or a small business concern and is interested in receiving an award for a quantity of an Item not exceeding the quantity set forth in the non-set-aside portion of the procurement, should submit a bid in the same maner as other concerns bidding only on the non-set-aside portion. If such a bidder is interested in receiving an award for a quantity of an Item in addition to the quantity set forth in the non-set-aside portion, it must bid the entire quantity of the non-set-aside portion of the Item, and indicate such additional quantity of the Item as it desires by so specifying on the Addendum to this Notice. Thus, the Notice Addendum is not to be used unless the bidder has bid the entire quantity of an Item under the non-set-aside portion.

However, a labor surplus area or small business concern which receives no award, or receives an award for less than the total quantity of an Item for which it submitted a bid under the non-set-aside portion, may be eligible for an award of the quantity it bid, or the unawarded quantity thereof, under the following procedure governing the set-aside portion.

(c) *Set-aside portion and award procedure.* Award of the set-aside portion of this procurement will be made after award has been completed on the non-set-aside portion. It will be made only to labor surplus area or small business concerns which are found to be eligible in accordance with (1) below; on the basis of priorities for award set forth in (2) below; for quantities as provided in (3 below; and at prices determined in accordance with (4) below.

(1) *Eligibility.* To be eligible for consideration for the set-aside portion of an Item, the labor surplus area or small business concern must have submitted a responsive bid on such Item in accordance with the requirements of (b) (2) above at a unit price no greater than 120 percent of the highest unit price for such Item awarded under the non-set-aside portion. However, see (5) below when separate quantities are offered at different prices and see (6) below when separate quantities are offered at tie-in prices.

(2) *Priorities.* Negotiations for the set-aside portion will be conducted with such bidders in the following order of priority:

Group 1. Persistent labor surplus area concerns which are also small business concerns.

Group 2. Other persistent labor surplus area concerns.

Group 3. Substantial labor surplus area concerns which are also small business concerns.

Group 4. Other substantial labor surplus area concerns.

Group 5. Small business concerns which are not labor surplus area concerns.

Within each of the above groups, negotiations for each Item will be conducted with eligible concerns in the order of their bids on the non-set-aside portion, beginning with the lowest responsive bids. However, see (5) below for the method of determining the bid when separate quantities are offered at different prices and see (6) below when separate quantities are offered at tie-in prices.

(3) *Quantity.* The quantity of the set-aside portion of an Item which may be awarded to an eligible concern shall be as follows:

(A) As to an eligible concern which has not specified on the Notice Addendum a quantity of the sea-aside portion of the Item which it desires in addition to the entire non-set-aside portion thereof, the quantity shall be no greater than the quantity of such concern's bid on the non-set-aside portion of that Item, less the quantity, if any, of that Item awarded to that concern under the non-set-aside portion.

(B) As to an eligible concern which has submitted a bid for the entire non-set-aside portion of the Item and has specified on the Notice Addendum a quantity of the set-aside portion of that Item which it desires in addition to the entire non-set-aside portion thereof, the quantity shall be no greater than the total of the entire non-set-aside portion of the Item and the quantity thereof specified on the Notice Addendum, less the quantity, if any, of that Item awarded to that concern under the non-set-aside portion.

(4) *Price.* The set-aside shall be awarded at the highest unit price awarded on the non-set-aside portion, adjusted to reflect transportation and other cost factors which were considered in evaluating bids on the non-set-aside portion. However, see (6) below for the highest unit price when the highest award is made on separate quantities at tie-in prices.

(5) *Separate Quantities at Different Prices.* Where a concern has submitted a bid for separate quantities of the non-set-aside portion of an Item at different prices, without conditioning the Government's right to accept one or more such quantities upon its concurrent acceptance of another quantity of the Item each separate quantity shall be considered as a separate bid for the purpose of determining the eligibility of the concern with respect to the 120 percent limit prescribed in (c) (1) above, and for the purpose of determining under (c) (2) above the standing of that bid in the order of negotiations for the set-aside portion of that Item.

(6) *Separate Quantities at Tie-in-Prices.* Where a concern has submitted a bid for separate quantities of the non-set-aside portion of an Item at different prices, and has conditioned the Government's right to accept any one or more of such quantities upon its concurrent acceptance of another quantity of the Item, the weighted average of the prices for such conditioned quantities shall be considered the unit price for the purpose of determining, with respect to such conditioned quantities, (i) the eligibility of the firm with respect to the 120 percent limit of (c) (1) above, (ii) the priority status of the firm under (c) (2) above, and (iii) the highest unit price for awards under (c) (4) above if the highest award on the non-set-aside portion was made on such conditioned bid.

(d) *Definitions.* (1) A "labor surplus area" is a geographical area which at the time of award is:

(i) classified by the Department of Labor as an "Area of Substantial Labor Surplus" or as an "Area of Substantial and Persistent Labor Surplus" and listed as such by that Department in conjunction with its bi-monthly publication "Area Labor Market Trends"; or

(ii) not classified as in (i) above, but which is individually certified as an area of persistent or substantial labor surplus by the Department of Labor at the request of any prospective contractor.

(2) Labor surplus area concern includes:

(i) persistent labor surplus area concerns which will perform or cause to be performed any contracts awarded to them as labor surplus area concerns substantially in "Areas of Substantial and Persistent Labor Surplus"; and

(ii) substantial labor surplus area concerns which will perform or cause to be performed any contracts awarded to them as labor surplus area concerns substantially in "Areas of Substantial Labor Surplus."

(3) A "small business concern" is a concern that (i) is certified as a small business concern by the Small Business Administration, or (ii) is independently owned and operated, is not dominant in its field of operation and, with its affiliates, employs fewer than 500 employees. In addition to meeting these criteria, a manufacturer or regular dealer submitting bids or proposals in his own name must agree to furnish in the performance of the contract end items manufactured or produced in the United States, its possessions, or Puerto Rico, by small business concerns; provided, that this additional requirement does not apply in connection with construction of service contracts.

(e) *Token bids.* Notwithstanding the provisions of this Notice, the Government reserves the right, in determining eligibility or priority for set-aside negotiations, not to consider token bids or other devices designed to secure an unfair advantage over other bidders eligible for the set-aside portion.

(f) *Instruction for use, and explanation of, notice addendum.* The quantity of each Item which has been set aside is set forth on the attached Notice Addendum. As provided in (b) (2), the Notice Addendum is to be filled in only by labor surplus area and small business concerns. Furthermore, it is to be used by such a concern only when (i) it has submitted a bid for the entire non-set-aside quantity of an Item, and (ii) it desires a total quantity in excess of the non-set-aside quantity thereof. Whether or not a labor surplus area or small business concern may participate in the set-aside portion is dependent on its eligibility in accordance with paragraph (c) above. It should be noted, however, that to be eligible for the set-aside portion it need not have filled in the Notice Addendum. The latter should only be filled in where the concern desires a quantity in excess of the quantity set forth in the schedule.

NOTICE ADDENDUM FOR SET-ASIDE

The quantity of each item which has been set aside is as follows:

1	2	3
Item No.	Quantity set-aside	Quantity desired

(The issuing office will identify by line item number the supplies being procured as to which a portion is set aside and will designate the quantity set aside for each such item. The quantity desired column will be left blank for the bidder or offeror to fill in.)

(d) After all awards have been made on the non-set-aside portion, procurement of the set-aside portion shall in all instances be effected by negotiation. Negotiation shall be conducted only with those bidders or offerors who have submitted responsive bids or proposals on the non-set-aside portion at a unit price no greater than 120 percent of the highest award made on the non-set-aside

portion and who are determined to be responsible prospective contractors for the set-aside portion of the procurement. Negotiations shall be conducted in the order of priority indicated in the foregoing notices. Where equal low bids are received on the non-set-aside portion from concerns which are eligible for the set-aside portion, the concern which is awarded the non-set-aside portion (under the equal low bid procedures of § 2.407–6 of this chapter) shall have first priority with respect to negotiations for the set-aside portion. The set-aside portion shall be awarded at the highest unit price awarded for the non-set-aside portion. If the entire set-aside portion cannot be awarded by the method described herein, any unawarded portion may be procured by advertising or negotiation, as appropriate, in accordance with existing regulations (see § 3.201–2(b)(1) of this chapter).

§ 1.804–3 Withdrawal of set-asides.

If, prior to the award of a contract involving a labor surplus set-aside, the contracting officer considers that the set-aside is detrimental to the public interest, e.g., because of unreasonable prices, the contracting officer shall withdraw the set-aside and complete the procurement by advertising or negotiation as appropriate in accordance with existing regulations. A signed memorandum setting forth the basis of the withdrawal of any set-aside shall be made and retained.

§ 1.804–4 Contract authority.

Contracts for set-asides made under this Subpart H shall cite as authority 10 U.S.C. 2304(a)(1). For reporting purposes, see § 3.201–2(b)(1) of this chapter for contracts awarded to labor surplus area concerns and § 3.201–2(b)(2) for contracts awarded to small business concerns which are not labor surplus area concerns.

§ 1.805 Subcontracting.

§ 1.805–1 General policy.

It is the policy of the Government to encourage placement of subcontractors with concerns which will perform such contracts substantially in areas of persistent or substantial labor surplus, in the order of priority described in § 1.802 where this can be done, consistent with efficient performance of contracts, at prices no higher than are obtainable elsewhere.

§ 1.805–2 Required clause.

The clause "Utilization of Concerns in Labor Surplus Areas" as set forth in § 7.104–20 of this chapter, shall be inserted in contracts as required by § 7.104 of this chapter.

§ 1.806 Depressed industries.

§ 1.806–1 General.

When an entire industry is depressed, the Director of Civil and Defense Mobilization may, under Defense Manpower Policy No. 4, establish appropriate measures on an industry-wide, rather than on an area, basis. Designations of such industries are made by Office of Civil and Defense Mobilization Notifications, and such industries will be given special treatment as specified therein. §§ 1.806–2 through 1.806–5 reflect pertinent requirements of such Notifications with respect to the industries indicated. No price differentials will be paid to carry out policies of these Notifications.

§ 1.806–2 Apparel industry (Notification No. 53).

(a) As used in this section the "apparel industry" means all of the industry identified in the "Standard Industrial Classification Manual," under Major Group 23, except Group No. 239.

(b) There shall be no labor surplus area set-asides in this industry. Where feasible, under the same invitation, bids should be requested for jackets or coats and trousers as separate items so that bidders may bid in combinations of units, and if requirements warrant, at least an equal amount of trousers should be included.

§ 1.806–3 Petroleum and petroleum products industry (Notification No. 58).

There shall be no labor surplus area set-asides in this industry.

§ 1.806–4 Shipbuilding industry (Notification No. 57).

(a) As used in this section, the "shipbuilding industry" includes establishments primarily engaged in building all types of ships, barges, canal boats and lighters of five gross tons and over, whether propelled by sail or motor power or towed by other craft. Establishments primarily engaged in fabricating structural assemblies or components for ships, or subcontractors engaged in ship painting, joinery, carpentry work, electrical wiring installation, etc., are not included.

(b) There shall be no labor surplus area set-asides in this industry. In placing shipbuilding contracts, preferences shall be given, where practicable, to contractors which can perform the contracts without substantial use of overtime labor and without constructing new facilities. So as to spread work among a large number of private yards, bids or proposals shall be invited, and contracts awarded, on a small-lot basis rather than on a large-lot basis, to the extent practicable.

§ 1.806–5 Textile industry (Notification No. 38).

(a) As used in this section, the "textile industry" means all of the industry identified in the "Standard Industrial Classification Manual" under Major Group 22 (Textile Mill Products) and Industry Nos. 2391 and 2392 (Curtains and draperies, and house-furnishings), except that it does not include Industry No. 2274 (Linoleum, asphalt-felt base, and other hard-surface floor covering, not elsewhere classified), and Industry No. 2298 (Cordage and twine).

(b) No preference shall be given to any area or city in placing contracts in this industry. For the purpose of maintaining the effective functioning of the textile industry as a whole, purchasing activities shall try to place contracts with manufacturers whose weaving operations (in the case of weaving or integrated mills) or whose spinning operations (in the case of spinning mills) during the period of performance of such contracts will not exceed 80 hours per week (not including other supporting activities).

(c) In all procurements from the textile industry which are estimated to exceed $10,000, partial set-asides, exclusively for textile industry concerns whose "weaving" or "spinning" operations (as described in (b) above) will not exceed 80 hours per week, shall be made substantially in accordance with the procedures set forth in § 1.804, except that all "textile industry concerns whose weaving or spinning operations will not exceed 80 hours per week" will be treated as "labor surplus area concerns." The notice set forth in § 1.804–2(b) shall be designated "Notice of 80-Hour Week Set-Aside" and appropriately modified for use in accordance with this subparagraph.

Subpart I—Responsible Prospective Contractors

§ 1.900 Scope of subpart.

This subpart sets forth (a) general policy with respect to responsibility of prospective contractors, (b) minimum standards for responsible prospective contractors, (c) requirements and procedures for determination of responsibility, and (d) policy with regard to determination of subcontractor responsibility.

§ 1.901 Applicability.

This subpart applies to procurements from contractors located in the United States, its Territories, its possessions, or Puerto Rico; and will be applied in other places except where inconsistent with the laws and customs of the place where the prospective contractor is located. It is not applicable to procurements from (a) other governments, including state and local governments; (b) Canadian Commercial Corporation; (c) other United States Government departments and agencies, or their instrumentalities (such as Federal Prison Industries, Inc.); or (d) National Industries for the Blind.

§ 1.902 General policy.

Purchases shall be made from, and contracts shall be awarded only to, responsible prospective contractors. A responsible prospective contractor is one which meets the minimum standards set forth in § 1.903, and such additional standards as may be prescribed by overseas commanders and for specific procurements by purchasing activities.

§ 1.903 Minimum standards for responsible prospective contractors.

§ 1.903–1 General standards.

Except as otherwise provided in this § 1.903, a prospective contractor must—

(a) Be a manufacturer, construction contractor, or regular dealer, as defined in § 1.201–8 (this standard is not applicable to procurements of personal or professional services, or nonpersonal services in which the primary purpose is the rendering of the service rather than

the manufacture or supply of material or equipment, or the construction of public works, facilities, or vessels);

(b) Have adequate financial resources, or the ability to obtain such resources as required during performance of the contract (see Defense Contract Financing Regulations, Part 163, Subpart B and any amendments thereto. See also §§ 1.903–3 and 1.905–2, and, for SBA certificates of competency, § 1.705–6);

(c) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing business commitments, commercial as well as governmental (for SBA certificates of competency, see § 1.705–6);

(d) Have a satisfactory record of performance (Contractors who are seriously delinquent in current contract performance, when the number of contracts and the extent of delinquencies of each are considered, shall, in the absence of evidence to the contrary or circumstances properly beyond the control of the contractor, be presumed to be unable to fulfill this requirement (d). See §§ 1.905–2 and 1.905–4(d);

(e) Have a satisfactory record of integrity;

(f) Appear to be able to conform to the requirements of the standard nondiscrimination clause (see § 12.802); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

§ 1.903–2 Additional standards for production, construction, and research and development contracts.

In addition to the standards in § 1.903–1, in procurements involving production, construction, and research and development work (and in other procurements as appropriate), a prospective contractor must—

(a) Have the necessary organization, experience, operational controls, and technical skills, or the ability to obtain them (this standard includes, where appropriate, such elements as adequacy of production control procedures; quality assurance measures, including materials produced by subcontractors; etc. See § 1.903–3); and

(b) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (where a prospective contractor proposes to use the facilities or equipment of another concern (not a subcontractor) or an affiliate of the prospective contractor (see § 2.201(a)(23), all existing business arrangements, firm or contingent, for the use of such facilities or equipment shall be considered in determining the ability of the prospective contractor to perform the contract. See § 1.903–3).

§ 1.903–3 Ability to meet certain minimum standards.

Except to the extent that a prospective contractor proposes to perform the contract by subcontracting (see § 1.906), acceptable evidence of his "ability to obtain" resources, equipment, facilities, personnel, etc., (see §§ 1.903–1(b) and 1.903–2) shall generally be a commitment or explicit arrangement, which will be in existence at the time the contract is to be awarded, for the rental, purchase or other acquisition of such resources, equipment, facilities, or personnel.

§ 1.903–4 Affiliated concerns.

Affiliated concerns (see § 2.201(a)(23)) shall be considered as separate entities in determining whether the one of them which is to perform the contract meets the applicable standards for a responsible prospective contractor (but see § 1.701–1 with respect to status as a small business concern).

§ 1.904 Determinations of responsibility and nonresponsibility.

§ 1.904–1 Requirement.

Except as otherwise provided in § 1.904–2, no purchase shall be made from, and no contract shall be awarded to, any person or firm unless the contracting officer first makes, signs, and places in the contract file, an affirmative determination that the prospective contractor is responsible within the meaning of §§ 1.902 and 1.903. Where a certificate of competency has been issued the affirmative determination need not be made as to the factors covered by the certificate of competency. Where a bid or offer on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, a determination of nonresponsibility shall be made, signed, and placed in the file. The determination of responsibility or nonresponsibility shall contain a statement justifying the determination. Any supporting documents or reports, including any pre-award survey reports (see § 1.905–4) and SBA certificates of competency (see § 1.705–6), shall be attached to the determination.

§ 1.904–2 Exceptions.

Written determinations of responsibility need not be made in the case of—

(a) Purchases and contracts estimated to amount to less than $10,000; or

(b) Orders under existing Government contracts.

However, contracting officers shall not knowingly make any purchases from, or award contracts to, persons or firms other than responsible prospective contractors, notwithstanding the exceptions in this section.

§ 1.905 Procedures for determining responsibility of prospective contractors.

§ 1.905–1 General.

(a) Before making determinations of responsibility (see § 1.904), the contracting officer shall have in his possession or obtain information sufficient to satisfy himself that a prospective contractor currently meets the minimum standards set forth in § 1.903, to the extent that such standards are applicable to a specific procurement.

(b) Maximum practicable use will be made of information on file or within the knowledge of personnel in the Department of Defense to the extent that such information is currently valid. Each Department shall maintain such records and experience data as may be useful for the guidance of contracting officers in the placement of new procurements in the manner and at such level as the Department deems appropriate, and shall inform its contracting officers and the other Departments of the means of access to such records and data. Upon request of any contracting officer in the Department of Defense, information in such records and data shall be expeditiously furnished in the form developed by the providing Department (see § 1.303).

(c) Each purchasing activity shall provide for the maintenance of appropriate records to insure the availability of contractor performance history. Special attention shall be paid to, and more detailed records maintained on, contractors whose past performance is questionable and new contractors whose reliability is yet unestablished

(d) Generally, information necessary to make determinations of responsibility shall be obtained only concerning prospective contractors within range for an award, except where prequalification procedures are authorized by this Subchapter or by Departmental procedures.

§ 1.905–2 When information will be obtained.

Generally, information regarding the responsibility of a prospective contractor (including Pre-Award Surveys (see § 1.905–4) when deemed necessary) shall be obtained promptly after bid opening or receipt of proposals. However, in negotiated procurements, especially those involving research and development, such information may be obtained before the issuance of requests for proposals. Notwithstanding the foregoing, information regarding financial resources (see § 1.903–1(b)) and performance capability (see § 1.903–1(c)) shall be obtained on as current a basis as feasible with relation to the date of contract award.

§ 1.905–3 Sources of information.

Information regarding the responsibility of prospective contractors shall be sought among the following sources before considering performance of a Pre-Award Survey (see § 1.905–4):

(a) *From the prospective contractor.* Including representations and other information contained in or attached to bids and proposals; replies to questionnaires; financial data, such as balance sheets, profit and loss statements, cash forecasts, financial history of the contractor and affiliated concerns; current and past production records; personnel records; and lists of tools, equipment, and facilities; written statements or commitments concerning financial assistance and subcontracting arrangements; and analyses of operational control procedures. Where it is considered necessary by the contracting officer to prevent practices prejudicial to fair and open competition or for other reasons, prospective contractors may be required to submit affidavits concerning their ability to meet any of the minimum standards set forth in § 1.903, and company ownership and control (but see § 2.201(a)(23)).

(b) *Existing information within the Department of Defense.* Including rec-

ords on file and personal knowledge of personnel (including the contracting officer) within the purchasing activity making the procurement and other purchasing and related activities; military audit agencies; offices concerned with contract financing; the Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors (see § 1.601); and, records and experience data (see § 1.905–1).

(c) *Publications.* Including credit ratings; trade and financial journals; business directories and registers; and Synopses of U.S. Government Proposed Procurements, Sales and Contract Awards (see § §1.1003).

(d) *Other sources.* Including suppliers, subcontractors, and customers of the prospective contractor; banks and financial companies; commercial credit agencies; Government departments and agencies; purchasing and trade associations; better business bureaus and chambers of commerce.

§ 1.905–4 Pre-award surveys.

(a) *General.* A pre-award survey consists of an inspection of the plants and facilities with which the prospective contractor proposes to perform a contract, including personal interviews with contractor personnel.

(b) *Circumstances under which performed.* Generally, pre-award surveys will be performed when the sources mentioned in § 1.905–3 do not yield sufficient information to enable a contracting officer to make a determination regarding the responsibility of a prospective contractor. (But see paragraph (d) of this section.) Pre-award surveys shall not be performed for procurements listed in § 1.904–2 except (1) where the procurement involves the handling of classified matter or research and development work, (2) for the purpose of checking information tending to indicate that a prospective contractor is not responsible, or (3) as may be deemed essential by the contracting officer to obtain information which cannot be otherwise acquired.

(c) *Matters to be covered.* Pre-award surveys shall cover matters upon which—

(1) Current information is not available from the sources listed in § 1.905–3;

(2) Information available from such sources is insufficient, in the opinion of the contracting officer, to support a determination of responsibility; or

(3) Circumstances indicate the desirability of verification of information received from such sources.

(d) *Workload and financial capacity.* Regardless of the apparent sufficiency of information obtained from sources listed in § 1.905–3 indicating responsibility with respect to the standards set forth in § 1.903–1 (b) and (c), and in procurements which are significant either in dollar value or in the critical nature of the requirement, consideration shall be given to verification of information regarding workload and financial capacity by means of a pre-award survey with regard to such standards.

(e) *Interdepartmental coordination.* Pre-award surveys by one Department for another, or by any procuring or finance activity for another within a Department, may be made on a non-reimbursable basis. Such surveys shall be authorized to the extent practicable whenever such interchange will result in economy or increased efficiency, or will eliminate duplication of effort.

§ 1.906 Subcontractor responsibility.

To the extent that a prospective contractor proposes to perform the contract by subcontracting, determinations of prospective subcontractors' responsibility may be necessary in order to determine the responsibility of the prospective prime contractor. Determinations concerning prospective subcontractors' responsibility shall generally be a function performed by prospective prime contractors. (But see §§ 1.603(c) and 1.605–3(b) relating to approval of subcontractors listed on the Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors.) Prospective prime contractors may be required to (a) indicate the responsibility of proposed subcontractors in writing, or (b) show evidence of an acceptable and effective purchasing and subcontracting system encompassing a method for determining subcontractor capability.

§ 1.907 Disclosure of pre-award data.

Data, including information obtained from a pre-award survey, leading to a determination of the responsibility of prospective contractors shall not be released outside the Government and shall not be made available for inspection by individuals, firms or trade organizations: *Provided*, That such data may be disclosed to, or summarized for other elements within the Government on their request. Such information shall be made available to Department of Defense procurement personnel upon request in accordance with § 1.905–1. In making a determination of responsibility, information disclosed by such data may be discussed with the prospective contractor as necessary.

Subpart J—Publicizing Procurement Actions

§ 1.1001 General policy.

It is Department of Defense policy to increase competition by publicizing procurements which offer competitive opportunities for prospective prime contractors or subcontractors, thus assisting small business and labor surplus area concerns and broadening industry participation in Defense procurement programs.

§ 1.1002 Availability of invitations for bids and requests for proposals.

A reasonable number of copies of invitations for bids and requests for proposals publicized in the Department of Commerce Synopsis, including specifications and other pertinent information, shall be maintained by the issuing office. To the extent that unclassified invitations for bids and requests for proposals are available, they shall be provided at the purchasing office to manufacturers, construction contractors, and regular dealers and to others having a legitimate interest therein, such as publishers, trade associations, procurement information services and others who disseminate information concerning invitations for bids and requests for proposals; otherwise the purchasing office may limit the availability of invitations for bids and requests for proposals to perusual at such office.

§ 1.1003 Synopses of proposed procurements.

§ 1.1003–1 General.

Every proposed advertised or negotiated procurement made in the United States, except in Hawaii and Alaska, which may result in an award in excess of $10,000 shall be publicized promptly in the Department of Commerce "Synopsis of U.S. Government Proposed Procurement, Sales and Contract Awards," except that the following need not be publicized in the Synopsis:

(a) Procurement to be made by an order placed under an existing contract.

(b) Procurement which must be made too quickly to permit prospective contractors, dependent on the Synopsis for information, to obtain the necessary solicitation document and to prepare and submit their bids, proposals, or quotations on time: i.e., proposed procurements with less than 15 calendar days from the date of transmittal of the Synopsis or the date of issuance of the solicitation, whichever is earlier, to the date scheduled for receipt of bids, proposals, or quotations.

(c) Procurement to be made from or through another Government department or agency, or a mandatory source of supply such as National Industries for the Blind. (See Part 5 of this subchapter.)

(d) Procurement of personal or professional services to be negotiated under § 3.204 of this subchapter.

(e) Procurement from educational institutions to be negotiated under § 3.205 of this subchapter.

(f) Procurement in which only foreign sources are to be solicited.

(g) Procurement of electric power or energy, gas (natural or manufactured), water, or other utility services.

(h) Procurement of scientific or technical studies or surveys.

(i) Procurement of perishable subsistence.

(j) Procurement where competition is precluded by reason of patent rights, copyrights, or secret processes which are limited to a single producer.

(k) Procurement of research and development for which specific background knowledge or unusual scientific or technical equipment is a prerequisite to performance.

(l) Procurement of a classified nature where the information necessary to be included or referenced in the solicitation is in itself of a classified nature and the public disclosure of this information would violate security requirements. All other classified procurements shall be published in the Synopsis, if sufficient information, of an unclassified nature, can be provided in the solicitation to enable a prospective contractor to submit a bid or proposal.

(m) Procurement of technical equipment requiring standardization and interchangeability of parts to be negotiated under § 3.213 of this subchapter.

(n) Procurement of technical or specialized supplies requiring substantial initial investment or extended period of preparation for manufacture, to be negotiated under § 3.214 of this subchapter.

(o) Procurement of technical, nonpersonal services in connection with assembly, installation, service, or repair (or instruction of personnel therein) of equipment of such a highly technical or specialized nature that they can only be performed by the original manufacturer or his authorized representative.

(p) Procurement in the interest of national defense or industrial mobilization, to be negotiated under § 3.216 of this subchapter.

(q) Procurement of parts for military equipment to be used for replenishment of stock, repair, or replacement, which are not to be procured from sources that have satisfactorily manufactured or furnished such parts in the past, pursuant to § 1.313 of this Part.

§ 1.1003–2 Research and development.

In order that potential sources may learn of research and development programs, advance notices of the Government's interest in a specific research and development field shall be published in the Department of Commerce Synopsis in accordance with § 1.1003–9(d) so as to give such sources adequate opportunity to submit information for evaluation of their research and development capabilities, except where security considerations prohibit such publication.

§ 1.1003–3 Synopses of subcontract opportunities.

Prime contractors and subcontractors should be encouraged to use the Department of Commerce Synopsis to publicize opportunities in the field of subcontracting stemming from their defense business. Prime contractors and their subcontractors will be advised to mail subcontract information directly to the U.S. Department of Commerce, Room 1300, 433 W. Van Buren Street, Chicago 7, Ill., under the heading "Subcontracting Assistance Wanted" and in the form of the following example:

XYZ CO., ATTN JOHN A. SMITH, TELE. NO. RANDOLPH 6-1111, 102 FIRST AVE., CHICAGO 7, ILL., seeks Subcontractor on items to be used in connection with Contract No. ——— awarded 5-1-60.

COILS, INDUCTION, DWG. NO. 10-742 ..... 10,000 ea.

(Name, description and quantity of other items or services may be included as long as contract assistance is desired under the same contract number.) If interested, make inquiry before 5-16-50 to above Contractor.

§ 1.1003–4 Responsibility of small business specialists.

Small business specialists in each purchasing office are responsible for screening all proposed procurements and for recommending action to be taken with respect to publicizing such procurements in accordance with the requirements of § 1.1003–1 through 1.1003–9. In those offices where no small business specialist is assigned, the contracting officer or other designated representative shall accomplish the foregoing.

§ 1.1003–5 Publication of procurements of less than $10,000.

When recommended by procurement personnel or the small business specialist, and approved by the contracting officer, proposed procurements of less than $10,000 may be publicized in the Department of Commerce Synopsis.

§ 1.1003–6 Pre-invitation notices.

Where pre-invitation notices (§ 2.205–4 of this subchapter) are used, the pre-invitation information shall be included in the Synopsis. This information need not be re-published in the Synopsis when the invitation for bids is issued.

§ 1.1003–7 Availability of specifications, plans, and drawings.

(a) Where distribution of applicable specifications, plans, or drawings with the solicitation is impracticable, the Synopsis shall contain notice of this fact and of the locations at which the specifications, plans, or drawings may be examined or obtained. (See § 1.1203 of this part.)

(b) Where the specifications, plans, and drawings available do not fully provide manufacturing or construction details necessary to describe a requirement the Synopsis shall contain notice of this fact.

(c) Notices of the situations in paragraph (a) and (b) of this section shall be prepared in accordance with § 1.1003–9(f).

§ 1.1003–8 Time of publicizing.

To allow concerns which are not on current bidders lists ample time to prepare bids, proposals or quotations, purchasing offices should, when feasible, synopsize proposed procurements at least ten days before the issuance of solicitations, in accordance with § 1.1003–9(b)(8).

§ 1.1003–9 Preparation and transmittal.

(a) Each purchasing office shall transmit a synopsis of proposed procurements as follows:

(1) When teletypewriter service is available, all synopses shall be forwarded via teletypewriter at the end of each day, for invitations for bids, requests for proposals or quotations issued on that day, or at the earliest practicable time prior to issuance of the invitation for bids, requests for proposals or quotations, as is deemed appropriate, to the following address:

Synopsis, Commerce Department, Field Service, Chicago, Ill.

(2) When teletypewriter service is not available, synopses shall be dispatched by airmail or ordinary mail, whichever is considered most expeditious, addressed as follows: Administrative Officer, U.S. Department of Commerce, 433 West Van Buren Street, Chicago 7, Illinois.

(b) Each synopsis shall be prepared as described below:

(1) Lines in the text commencing flush with left margin will not exceed 69 typewritten spaces. Double spaced lines will be used to describe each procurement action. Descriptions of different procurement actions will be separated by 4 lines.

(2) The first line of the text of the message will state the number of the synopsis being sent. Synopses will be numbered consecutively by the purchasing office during the calendar year. New numerical series beginning with number one will start as of the first working day of January of each year. Double space between this line and the next line.

(3) The second line of the text of the message will state name and location of the purchasing office straight across the page, not to exceed 69 typewritten spaces. No abbreviations are to be used except for name of State. If more than one line is required for name and location of purchasing office, double space and continue on subsequent line or lines if necessary, double spacing between each line. The address may include an attention phrase directed to an official by name or title.

(4) Four spaces below the preceding line entry (name and address of purchasing office), the description of the supplies or services being procured will begin in narrative paragraph form, double spaced, with each line commencing flush with the left margin. If the synopsis contains a number of items having the same purchase reference number and the same bid opening date or advance notice date, the description should be preceded by a blanket statement such as, "The following described items are to be procured under IFB ENG (number of Invitation for Bid) Opening Date, 31 August 1955." The length of the lines in the description will not exceed 69 typewritten spaces. The description will be clear, concise, and with a minimum number of words but sufficient for understanding by interested parties. It will include, as appropriate, commonly used names of supply items, basic materials from which fabricated, general size or dimensions, citations of specification or drawing numbers, or other data. If the material being procured is covered by one or more specifications requiring qualification testing and approval and such requirement has not been waived by competent authority, the notation "(QPL)" shall be inserted immediately following the specification number. The Federal stock number will also be included where one has been assigned. In the absence of a Federal stock number, the service stock number will be included where one has been assigned. Stock numbers will not be required for items controlled by a single manager agency or when more than six items are listed on the synopsis. In the latter case, however, stock numbers will be listed for the six items of highest value. No abbreviations will be used in describing supplies or services, although standard abbreviations may be used in listing the quantity purchase reference numbers, specifications and bid opening date. Punctuation symbols will be used as in normal correspondence. Fractions on typewriter keys will not be used but fractions may be expressed by (number)/(number) e.g., 11/16, 1/4, 1/2. The symbols # or @ or * may not be used since they are not used in teletypewriter operation.

(5) Following the complete description of the supplies and services which will end with a period, two hyphens will

be used to set off the quantity to be procured. The quantity usually will be stated in numerals followed by the unit, (abbreviations of units are permissible, e.g., lbs., ea., doz.). Whenever it is necessary to use "Indefinite Quantity," the description should include a statement as to the duration of the contract or period covered.

(6) The quantity will be followed by two hyphens before indicating the place of delivery as follows: "Deliveries to ----------." Places of delivery should be stated specifically when there are not more than three destinations. When delivery points are more numerous, they will be grouped, if practicable, to show the general geographic area, e.g., "West Coast," "East Coast," or other appropriate regional description. Otherwise, the places of delivery will be stated as "Various Destinations" or "Destination(s) to be furnished."

(7) The places of delivery will be followed by two hyphens before commencing with the invitation for bids number or other purchase reference number, which may consist of letters, numerals, or abbreviations separated by hyphens or spaces. Invitation for bids numbers shall be identified and followed by the letter "B"; request for proposals and request for quotations numbers shall be followed by the letter "Q". Purchase reference numbers should not be broken or appear on one line carried over on the subsequent line, as the insertion of a hyphen for the carry-over would change the reference number.

(8) Two hyphens will be used following the invitation for bids number or purchase reference number to set off the bid opening date or the advance notification date. The date should be stated in military style (date, month and year, e.g., 1 Aug 58). If the synopsis is published prior to issuance of the invitation for bids or request for proposals or quotations, the synopsis shall include a statement to the effect that requests for such invitations, proposals, or quotations should be received not later than 10 days from the date of publication of such synopsis in order to enable the purchasing office to mail such invitation for bids, request for proposals, or request for quotations directly to the inquirer at the time of issuance thereof.

(c) In addition to the foregoing, where the proposed procurement is to be effected in accordance with a small business set-aside (see § 1.706 of this part) or labor surplus area set-aside (see § 1.804 of this part), the synopsis shall (1) where there is a 100 percent small business set-aside, state that "The proposed procurement(s) listed herein is (are) under 100 percent small business set-aside," or (2) where there is a partial small business or labor surplus area set-aside, state that "An additional quantity of ------ is being reserved for ---------- (insert "small business" or "labor surplus area" as appropriate) under a partial determination."

NOTE: To avoid confusion, separate messages should be sent covering proposed procurements which are under 100 percent small business set-aside so that they will be placed in the Department of Commerce's Notice to Small Firm Section.

(d) Notices which invite the submission of information as to research and development capabilities in specific fields of interest shall be headed "Research and Development Sources Sought." This shall be followed by a statement similar to the following: "Firms having research and development capabilities in the field of—(Be specific)—and whose facilities and personnel include—(Describe in substantial detail minimum facilities and personnel required)—are invited to submit complete information to the purchasing office listed above. Information furnished should include the total number of employees and professional qualifications of scientists, engineers, and technical personnel; a description of general and special facilities; an outline of previous projects; a statement regarding industrial security clearance, if previously granted; and other available descriptive literature. This is not a request for a proposal.

(e) Synopses of proposed procurements of a classified nature released in an unclassified form shall contain the following statement: "Security Clearance Will Be Required of Successful Bidder or Offerer."

(f) Procurements on which it is impracticable to distribute plans, drawings or specifications, or where adequate plans, drawings or specifications to describe a requirement are not available, shall be so identified in the Synopsis. Suggested headings and statements for these two situations are:

(1) Availability of Specifications, Plans or Drawings.

It will be impracticable to distribute the applicable ----------

---

(Insert "specifications," "plans," "drawings" or other appropriate words)

with the solicitation. This data may be examined or obtained at ----------

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(Be specific)

(2) Complete Data Not Available.

Notice is given that available specifications, plans, or drawings, relating to the procurement described below do not fully provide all necessary manufacturing and construction details.

(g) Each reporting office will discuss the instructions contained in this section with its communications office so that the manner in which the message is to be transmitted is understood by the office preparing the message and the communications office.

§ 1.1004 Synopsis of contract awards.

Awards of all unclassified contracts to be performed in whole or in part within the United States, exceeding $25,000 in amount, shall be published in the Department of Commerce "Synopsis of U.S. Government Proposed Procurement, Sales and Contract Awards."

§ 1.1004–1 Preparation and transmittal.

(a) Purchasing offices shall prepare and forward single copies of synopses of contract awards, using the same format as prescribed for synopses of proposed procurements in § 1.1003–9, to the address below, by air mail or ordinary mail whichever is considered most expeditious, before the close of business at the end of each week:

U.S. Department of Commerce, 433 W. Van Buren Street, Room 1300, Chicago 7, Ill.

(b) The synopsis of contract awards shall contain the following information:

(1) The name and address of purchasing office;

(2) A clear and concise description of the supplies or services being procured, such description to be followed by the contract number and date and, in parentheses, by the applicable number of the invitation for bids or request for proposals;

(3) The quantity of each item;

(4) The dollar amount of the award;

(5) The name and full address of the contractor; and

(6) When requested by the prime contractor, a statement of the industries, crafts, processes, or component items in or for which subcontracts are available and subcontractors are desired, together with the general area, if any, indicated by the prime contractor, such as Southeast States, West Coast, New England.

§ 1.1005 Paid advertisement in newspapers and trade journals.

§ 1.1005–1 Scope.

Sections 1.1005 through 1.1005–12 implement 5 U.S.C. 22a; 44 U.S.C. 321, 322 and 324; and Title 7, Chapter 5200, General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies.

§ 1.1005–2 Definition.

As used in §§ 1.1005 through 1.1005–12, "newspaper" means a publication printed and distributed at stated intervals to convey news, and includes trade journals which carry news in addition to technical matter.

§ 1.1005–3 General.

Generally, paid advertisements in newspapers shall not be used. However, when time will permit, the publication of essential details of invitations for bids in newspapers as paid advertisement may be authorized as indicated below, when necessary to secure effective competition, provided written authority to advertise has been obtained in advance.

§ 1.1005–4 Limitation.

No advertisement of a proposed procurement shall be published in any newspaper published and printed in the District of Columbia unless the supplies are to be furnished for use, or the labor is to be performed, in the District of Columbia or in the adjoining counties of Maryland or Virginia.

§ 1.1005–5 Authority and delegation.

Authority to approve the publication of paid advertisements in newspapers is vested by statute in the Secretary of each Department. This authority may be delegated by the Secretary in writing, by position designation, to subordinates within his Department. The delegation shall specify the limitations, if any, of the authority granted. Administrative duties involved in accomplishing the advertising may be assigned by the delegate to subordinates, by name or position, by

suitable instruments in writing, personally signed by the delegate, setting forth the extent of the administrative duties involved. A copy of the instrument delegating authority to advertise and a copy of the instrument assigning administrative duties thereunder will either be attached to the first voucher submitted for payment or shall be forwarded immediately upon issuance to the General Accounting Office address to which records of the Department are submitted for audit purposes. Copies of such instruments shall also be attached to the duplicate voucher submitted to the paying office pursuant to § 1.1005–12.

§ 1.1005–6 Requests for authority to place advertisement.

(a) Special or general authority to place advertisements in newspapers must be secured in advance and as prescribed by each Department. Special authority authorizes the publication of a given advertisement a specified number of times in a designated newspaper or newspapers. General authority authorizes the publication during a fiscal year, as designated, of such advertisements for bids as may be required by the duties of officers engaged in making frequent purchases or contracts.

(b) Requests for authority to advertise shall specify the newspapers in which it is deemed advantageous to advertise.

§ 1.1005–7 Preparation of advertisement.

(a) Except as provided in paragraph (b) of this section, all advertisements will be set solid, without paragraphing, in accordance with usual Government requirements, a sample of which is shown on Standard Form 1143 (Advertising Order).

(b) When advertising to be set other than solid is purchased, the specifications for such advertising must be definite, clear, and specific. No allowance shall be made for paragraphing, for display leaded or prominent headings, unless specifically ordered, or for additional space required by the use of type other than that specified. Specifications for advertising other than solid will accompany the advertisement copy submitted to the published with the advertising order, and copies of both documents will be transmitted to the General Accounting Office with the voucher.

§ 1.1005–8 Insertions.

(a) *Number of insertions.* No greater number of newspapers or insertions shall be used in any case than is necessary to give proper and sufficient public notice. Ordinarily, advertisements will be given six insertions in daily or four insertions in weekly papers. Such insertions shall be placed in sufficient time prior to the date of opening of bids to allow interested bidders to obtain plans and specifications and prepare bids. In case of emergency, advertisements may be inserted one or more times, as time and circumstances permit.

(b) *Limitations on time of publications.* No authorization will be given for the publication of an advertisement beyond the morning of the day on which the opening of bids is to occur, and no payments will be made for continuing such publication beyond the period authorized.

§ 1.1005–9 Rates.

Advertising may be paid for at rates not to exceed the commercial rates charged to private individuals, with the usual discounts.

§ 1.1005–10 Proof of publication.

(a) Every voucher rendered for official advertising should be accompanied by a copy of each issue (or tear sheet) of the publication in which the advertisement appeared. However, if copies of the publications (or tear sheets) are not available, an affidavit of publication may be furnished in lieu thereof.

(b) Copies of publications (or tear sheets), or affidavits in lieu thereof, submitted as proof of publication shall be retained in the paying officer's files until settlement of his account by the General Accounting Office, after which they may be disposed of.

§ 1.1005–11 Forms.

(a) Standard Form 1143 (Advertising Order) shall be signed by the person to whom authority to advertise has been delegated, or by the person to whom administrative authority to place the advertising has been assigned (see § 1.1005–5). In the latter case, the date and number of such instrument of assignment shall be put in the box on the standard form to the left of the signature. The date and number of the instrument delegating authority to advertise shall be put in the box in the upper right hand corner of the form. See § 1.1005–7, with reference to the composition of the advertising copy, in connection with the preparation of this form.

(b) The public voucher will be prepared by publishers to bill their charges against the Department for advertising published in accordance with the advertising order (Standard Form 1143). The Public Voucher for Advertising (original) is printed on the reverse of the original advertising order (Standard Form 1143). The Public Voucher for Advertising (memorandum) is printed on the reverse of the memorandum advertising order (Standard Form 1143a). Separate instruments shall not be used for ordering advertising and the payment therefor. The instructions in § 1.1005–10 apply when this form is used.

§ 1.1005–12 Payment.

Upon receipt of the public voucher, supported by proof of publication, from a publisher, the officer placing the advertisement will assemble and attach appropriate supporting documents (see § 1.1005–5), sign the second certificate on the reverse of Standard Form 1143, and submit the account in duplicate to the proper paying office for payment.

§ 1.1006 Publicizing award information.

§ 1.1006–1 Awards after formal advertising.

Except with respect to procurements not in excess of $10,000, press releases or public announcements of awards after formal advertising shall state that the contract was awarded after competition by formal advertising and shall include the number of bids solicited and the number received.

§ 1.1006–2 Awards after procurement by negotiation.

Except with respect to those procurements not in excess of $10,000 and those further excepted by § 3.106 of this subchapter, the information contained in the notice to unsuccessful offerors prescribed by § 3.106(a)(1) shall:

(a) Be posted in a public place at the purchasing activity for at least seven days; and

(b) Be included in all press releases or public announcements of negotiated awards. Where the award was made after competitive negotiation (either price or design competition), press releases or public announcements shall include a statement to this effect.

Subpart K—Qualified Products

§ 1.1101 General.

(a) Where it is necessary to test products in advance of their procurement in order to obtain products of requisite quality, each Department may subject such products to qualification tests to determine if they are qualified for use. The results of such testing and approval may be set forth in a qualified products list. To establish a qualified products list, a specification must exist which requires qualification and specifies qualification testing. (Each Department publishes a "Military Index of Specifications and Standards," indicating those military specifications which require qualification. These indexes may be obtained by the public from the Superintendent of Documents, U.S. Government Printing Office, Washington 25, D.C.) Once established, a qualified products list shall be used for the purpose and in the manner set forth in this subpart.

(b) The entire process by which products are solicited from manufacturers, examined and tested, and then identified on a qualified products list is known as qualification. Qualification testing is performed independently of any specific procurement action. Qualification of specific products is required prior to opening bids or award of negotiated contracts. Further information regarding qualified products lists may be found in the "Military Manual for Qualified Products Lists" (Standardization Manual M204) copies of which may be obtained from the Superintendent of Documents, Washington 25, D. C.

§ 1.1102 Justification for establishment of a qualified products list.

(a) A qualified products list may be established for a product only when one or more of the following conditions exists:

(1) The time required for testing after award would unduly delay delivery of the supplies being purchased;

(2) The cost of repetitive testing would be excessive;

(3) The tests would require expensive or complicated testing apparatus not commonly available; or

(4) The interest of the Government requires assurance, prior to award, that the product is satisfactory for its intended use.

(b) Qualified products lists may be established under paragraph (a)(2) or (3) of this section only after approval by: in the case of the Army, the Office of the Deputy Chief of Staff, Logistics; in the Navy, the Office of Naval Material (Code M30); and in the Air Force, the Directorate of Procurement and Production, Hq., Air Materiel Command.

§ 1.1103 Qualification of products.

§ 1.1103–1 Opportunity to qualify.

(a) Upon determination that a product is to be covered by a qualified products list, manufacturers shall be urged to submit their products for qualification and generally shall be given sufficient time to arrange for qualification testing prior to issuance of the initial invitation for bids or request for proposals for the product as a qualified product. Appropriate notice of such determination shall be furnished to the U.S. Department of Commerce, 433 West Van Buren Street, Chicago 7, Illinois, for publication in the daily "Synopsis of U.S. Government Proposed Procurement, Sales and Contract Awards." The publicity given to the requirement for qualification testing shall include the following:

(1) An intention to establish a qualified products list for a product;

(2) The specification number and nomenclature of the product, and the name and address of the office to which the request for qualification should be submitted; and

(3) Notice that in making future awards consideration shall be given only to such products as have been accepted for inclusion in a qualified products list.

(b) Contact shall be made with companies known to be interested in submitting products for qualification testing under the applicable specifications. Where appropriate, trade associations in a particular industry shall be notified.

(c) Where practicable, notices in the following form should be sent to commercial journals and trade magazines of the industry concerned through established channels for news releases:

The (bureau, service or command), Department of the (Army, Navy or Air Force), has announced the intention to establish a Qualified Products List for (item) under specification (symbol). Companies which have a product meeting the requirements of this specification are urged to contact (name and address of activity) for an opportunity to have their products tested, since in making future awards, consideration may be given only to such products as have been tested and accepted for inclusion in the Qualified Products List.

The above notice may also be sent to all firms or individuals on the appropriate bidders' mailing list.

§ 1.1103–2 Testing of product.

The manner and extent of testing shall be in accordance with the applicable specification. Whether a product should be placed on a qualified products list will be determined by the results of the tests made to determine conformance to the specification requirements.

§ 1.1103–3 Notification to manufacturer.

The Department responsible for qualification shall notify the manufacturer of the results of the testing and whether the product has met the qualification requirements of the applicable specification. When the product qualifies for inclusion on the qualified products list, notification thereof shall be given to the manufacturer together with the following statements in regard thereto: (a) That such listing does not guarantee acceptance of the product in any purchase; (b) that such listing does not constitute a waiver of the requirements of the specification as to acceptance, inspection, testing, or other provisions of any contract involving such product; (c) that such listing, the letter Notification of Qualification, the results of tests or other information relating to qualification shall not be circulated, referred to, or otherwise used for publicity or advertising purposes, or for sales other than those leading to ultimate use of the product by an agency of the Federal Government, and that if so used, such qualification is subject to cancellation by the Department concerned. If the product does not qualify for inclusion on the qualified products list, notice thereof shall be given to the manufacturer with a report covering the results obtained by the test. Whether or not a product qualifies, it will be returned after testing to the manufacturer "as is," unless destroyed or consumed in testing, or disposed of as authorized by the manufacturer.

§ 1.1104 Qualified products lists.

§ 1.1104–1 General.

Products qualified by qualification tests, as described by § 1.1103, shall be listed for reference by the Departments. Lists of qualified products are for the convenience of the Departments, their contractors, and subcontractors in the performance of procurement functions. The reproduction of lists or any reference to lists, in whole or in part, for advertising or publicity purposes is prohibited. A list may be made available to prospective bidders or suppliers who require the list in furnishing supplies or services to the Government or its contractors.

§ 1.1104–2 Military lists.

Where qualification is in accordance with tests prescribed by specifications, the compilation, preparation, form, maintenance, and administration of qualified products lists shall be in accordance with the procedures prescribed by the Assistant Secretary of Defense (Supply & Logistics). See "Military Manual for Qualified Products Lists" (Standardization Manual M204).

§ 1.1104–3 Department lists.

Where qualification is in accordance with tests prescribed by a Department, qualified products lists shall be compiled, prepared, maintained, and administered in accordance with procedures prescribed by that Department.

§ 1.1104–4 Distribution of list, notice of qualification, and other information.

(a) Each Department shall furnish copies of its list (including changes thereto) to each of the other Departments. Except as provided in § 1.1104–1 and paragraph (b) of this section, qualified products lists, letter notices of qualification, or other qualification information shall not be distributed outside the Departments.

(b) The Department responsible for qualification after appropriate determination that such action is in the best interest of the Government and in accordance with current security policy may:

(1) Release qualified products lists and other qualification information to other activities of the Federal Government;

(2) Release such lists and information to friendly foreign governments purchasing, operating or maintaining supplies, which involve products covered by specifications requiring qualification, on the condition that the information shall be used only in connection with furnishing supplies or services to that government; and

(3) Authorize the supplier or prospective supplier to furnish qualification information applicable to military specifications in the case of sales to friendly foreign governments which are purchasing, operating or maintaining supplies that involve products covered by specifications requiring qualification, after clearance with appropriate intelligence authority in each instance of procurement.

§ 1.1104–5 Publicity purposes.

No Department shall authorize the reproduction of lists or any reference to lists, in whole or in part, for advertising or publicity purposes.

§ 1.1104–6 Requirement that lists be kept open.

The lists shall always be open for inclusion of products from additional manufacturers as their products are submitted for qualification and become qualified.

§ 1.1104–7 Withdrawal of qualification and removal from list.

The qualification of a product may be withdrawn by the Department concerned if it is determined that the product does not meet requirements. Before such withdrawal the manufacturer shall be notified that its product is being considered for withdrawal from the qualified products list, and the reasons therefor, and shall be given an opportunity to comment. If it is determined that the product no longer qualifies, the product shall be withdrawn from the qualified products list and the Department concerned shall notify the manufacturer of the withdrawal. A product may be removed from a list at the request of its manufacturer.

§ 1.1104–8 Effect of debarment or suspension.

Notwithstanding any other provision of this subpart, the inclusion of a product on the qualified products lists may be denied, and the qualification of a listed

product may be withdrawn, by the Department concerned, without notification to the manufacturer, if the name of the manufacturer appears on the lists of debarred or ineligible bidders which are maintained pursuant to Subpart F of this part. With reference to Type B listings, the provisions of this section shall be applicable only if the qualified product is in the category prescribed by the Secretary of Labor (see § 1.603).

§ 1.1105 Procurement of qualified products.

§ 1.1105–1 General.

(a) Whenever procurement of qualified products is made, only bids or proposals offering products which have been qualified prior to the opening of bids or the award of negotiated contracts shall be considered in making an award. Manufacturers having products not listed but which have been qualified should be given consideration and an opportunity to offer evidence of such qualifications in the time interval before final award must be made.

(b) To encourage manufacturers to make timely arrangements for qualification tests of their products, contracting officers shall be governed by subparagraphs (1) through (3) of this paragraph.

(1) *Synopsis of proposed procurement.* The purchasing activity shall publicize the proposed procurement in the Synopsis, in accordance with § 1.1003 of this part, promptly upon receipt of the purchase requisition.

(2) *Solicitation period.* To the extent consistent with timely accomplishment of the procurement the period between issuance of the invitation for bids, or the request for proposals, and the opening of bids or the award of negotiated contracts should be the maximum time feasible. However, contracting officers shall insure that the solicitation period allows at least a minimum of 30 calendar days between the issuance and opening dates. Openings of less than 30 days may be set in cases of urgency: *Provided,* The justification for a shorter opening be in writing and made part of the procurement file. In appropriate cases, advance notice of procurements of qualified products may be given suppliers through the use of pre-invitation notices. Such notices shall identify specification requiring qualification and shall specify the time within which such qualification must be accomplished.

(3) *Distribution.* In procuring qualified products through formal advertisement, invitations for bid will not be restricted to manufacturers whose product has been qualified but will be invited from bidders in the same manner as if a qualified product were not involved.

§ 1.1105–2 Notice.

In procurements involving qualified products, the following provision shall be inserted in invitation for bids:

With respect to products requiring qualification, awards will be made only for such products that have, prior to time set for opening of bids, been tested and qualify for inclusion in the qualified products list identified below, whether or not such products have actually been included in the list by that date. Manufacturers are urged to communicate with the office designated below and arrange to have the products that they propose to offer tested for qualification. Manufacturers having products not yet listed, but which have been qualified, are requested to submit evidence of such qualification with their bids or offers, so that they may be given consideration.

(Identify the Qualified Products List involved and give the name and address of the office with which manufacturers should communicate.)

The above provision shall be appropriately modified and used in negotiated procurements. Contracting officer shall forward requests for qualification tests received from prospective contractors to the activity listed in the specification as being responsible for qualification. An interim reply shall be made to such prospective contractors advising them of the disposition of their request.

Subpart L—Specifications, Plans, and Drawings

§ 1.1201 General.

(a) Plans, drawings, specifications or purchase descriptions for procurements shall state only the actual minimum needs of the Government and describe the supplies and services in a manner which will encourage maximum competition and eliminate, insofar as is possible, any restrictive features which might limit acceptable offers to one supplier's product, or the products of a relatively few suppliers. Items to be procured shall be described by reference to the applicable specifications or by a description containing the necessary requirements.

(b) Many specifications cover several grades or types, and provide for several options in methods of inspection, etc. When such specifications are used, the invitation for bids or request for proposals shall state specifically the grade, type, or method of inspection, etc., on which bids or offers are to be based.

§ 1.1202 Mandatory specifications.

(a) Except as provided in paragraph (b) of this section the following specifications are mandatory for use by the Department of Defense in the procurement of supplies and services covered by such specifications:

(1) Federal specifications, unless determined by the Department of Defense to be inapplicable for its use; and

(2) Coordinated Military specifications approved by the Department of Defense for its use.

(b) Federal and Military specifications need not be used for the following unless required by Departmental instructions:

(1) Purchase incident to research and development;

(2) Purchase of items for test or evaluation;

(3) Purchase of laboratory test equipment for use by Government laboratories;

(4) Purchase of items for authorized resale except military clothing;

(5) Purchase of items in an amount not to exceed $2,500 (multiple small purchases of less than $2,500 of the same item shall not be made for the purpose of avoiding the use of Federal or Military specifications);

(6) Purchase of one-time procurement items; or

(7) Purchase of items for which it is impracticable or uneconomical to prepare a specification (repetitive use of a purchase description containing the essential characteristics of a specification will be construed as evidence of improper use of this exception).

(c) If it is determined, in accordance with the procedures established under the Defense Standardization Program by the Assistant Secretary of Defense (Supply and Logistics), that the specifications listed in paragraph (a) of this section do not meet the particular or essential needs of a bureau, service, or command, then (except as provided in paragraph (b) of this section) applicable interim Federal specifications or limited coordinated Military specifications should be used.

(d) Whenever a specification is found to be inadequate, immediate action shall be taken to effect the issuance of an amendment or revision in accordance with established procedures to obviate the necessity for repeated departures from the specification.

§ 1.1203 Availability of specifications, plans, and drawings.

Invitations for bids and requests for proposals will:

(a) So far as practicable, be accompanied by all applicable specifications, plans, and drawings, and shall so state that fact;

(b) State the exact locations where all applicable specifications, plans, and drawings may be obtained by prospective contractors and that such specifications, plans, and drawings were not furnished with the invitation for bids or request for proposal; or

(c) If distribution of applicable specifications, plans, or drawings is impracticable, state a reasonable number of locations at which they may be examined.

§ 1.1204 Packaging requirements.

Appropriate preservation, packaging, packing, and marking requirements will be included in contracts as applicable.

§ 1.1205 Offshore procurement.

Contracting officers accomplishing offshore procurement are authorized to use, where necessary, such specifications, standards, and purchase descriptions of foreign governments, or groups thereof, foreign trade associations, or purchase descriptions developed locally which will be readily understood by foreign vendors, provided, adequate measures are taken to insure satisfactory and acceptable products, including standard and interchangeable items, where required.

§ 1.1206 Purchase descriptions.

(a) A purchase description may be used in lieu of a specification when authorized by § 1.1202(b) and, subject to the restriction on repetitive use in § 1.1202(b)(7), where no applicable specification exists. A purchase description

should set forth the essential characteristics and functions of the items or materials required. Purchase descriptions shall not be written so as to specify a product, or a particular feature of a product, peculiar to one manufacturer and thereby preclude consideration of a product manufactured by another company, unless it is determined that the particular feature is essential to the Government's requirements, and that similar products of other companies lacking the particular feature would not meet the minimum requirements for the item. Purchase descriptions of services to be procured should outline to the greatest degree practicable the specific services the contractor is expected to perform.

(b) Generally, the minimum acceptable purchase description is the identification of a requirement by use of brand name followed by the words "or equal." This technique should be used only as a last resort when an adequate specification or more detailed description cannot feasibly be made available in time for the procurement under consideration. Where feasible, more than one brand name should be indicated. However, the words "or equal" should not be added when it has been determined in accordance with paragraph (a) of this section that only a particular product meets the essential requirements of the Government, as, for example, (1) where the required supplies can be obtained only from one source; (2) procurements negotiated under § 3.207 of this subchapter for specified medicines or medical supplies where it has been determined that only a particular brand name will meet the essential requirements of the Government; or (3) procurements negotiated under § 3.208 of this subchapter for supplies for resale where it has been determined by a selling activity that only a particular brand name will meet the desires or preferences of its patrons.

(c) (1) Where a "brand name or equal" purchase description is used, prospective contractors must be given the opportunity to offer supplies other than those specifically named by brand if such other supplies will meet the needs of the Government in essentially the same manner as those specified by brand. The "brand name or equal" description should specifically set forth those salient characteristics of the named supplies which are essential to the needs of the Government. For example, where interchangeability of parts is required, such requirement should be specified. Where a "brand name or equal" description refers to items, names, and numbers published in manufacturers' catalogs, the invitation for bids or request for proposal shall clearly identify the supplies called for. Such identification should include, for example, complete item names, identification of catalogs, and applicable catalog numbers with the corresponding catalog descriptions. The contracting officer will insure that a copy of any catalogs referenced (except parts catalogs) is available on request for review by bidders at the purchasing office.

(2) When a brand name or equal purchase description is included in an invitation for bids:

(i) The following shall be inserted after each item so described in the invitation for completion by the bidder.

Bidding on:
Manufacturer's Name ___ Brand ___ No. ___

(ii) In addition, the following clause shall be included in the invitation:

BRAND NAME OR EQUAL (JAN. 1960)

As used in this clause, the term "brand name" includes identification of supplies by make and model.

Certain supplies called for by this Invitation for Bids are identified in the schedule by a brand name "or equal" description. This identification is descriptive rather than restrictive. Bids offering "or equal" supplies will be considered for award if such supplies are clearly identified in the bids and are determined by the Government to be equal to the brand named supplies in all material respects.

Bidders must clearly indicate whether their bids are based on a brand name item or on an "equal" item by furnishing the information required below. IF THE BIDDER DOES NOT IDENTIFY THE BRAND NAME OR DESCRIBE IN FULL THE "OR EQUAL" ITEM WHICH IS OFFERED, AS PROVIDED IN (1) AND (2) BELOW, THE BID WILL BE REJECTED.

(1) If the bidder proposes to furnish a brand name item specified in this Invitation for Bids, such brand name shall be inserted in the space provided after each item so described.

(2) If the bidder proposes to furnish an "or equal" item, the brand name of the item proposed to be furnished, if any, shall be inserted in the space provided after each item so described, and in addition, the following descriptive data must be furnished:

A full description thereof, including pertinent physical, mechanical, electrical, and chemical details and a statement explaining the differences between the items being offered and any one of the corresponding brand name items called for by this Invitation for Bids. (This information may be supplied by separate attachments to the bid.)

In negotiated procurements the foregoing provisions may be suitably modified for use in the requests for proposals. If such provisions are not used, prospective contractors shall be informed that proposals offering supplies differing from those identified by brand name will be considered if the contracting officer determines that such offered supplies are equal in all material respects to the supplies identified by brand name. But the requirements of this subparagraph are not mandatory for small purchases made pursuant to Subpart F, Part 3, of this subchapter.

(3) Bids or proposals offering supplies which differ from the brand name supplies shall be considered for award where the contracting officer determines that the offered supplies conform to all characteristics specified in the invitation for bids or request for proposals and otherwise meet the needs of the Government in essentially the same manner as the brand name supplies. Bids or proposals shall not be rejected because of minor differances in design, construction, or features which do not affect the suitability of the supplies.

(4) Award documents shall identify, or incorporate by reference an identification of, the specific supplies (including any brand name and descriptive data specified in the bid) which the contractor is to furnish.

§ 1.1207 Alternate articles or qualities.

Invitations for bids and requests for proposals may provide for alternate bids or proposals on different articles or qualities of material, e.g., where two or more articles will be equally acceptable to the Government depending upon relative price. However, the alternate articles or qualities must be precisely described to assure that the same degree of competition is obtainable on the alternate bids or offers as is obtainable on the basic articles described.

Subpart M—Transportation

§ 1.1301 General.

(a) The transportation factors discussed in this subpart are important in awarding and administering contracts to insure that procurements are on the basis most advantageous to the Government, all factors considered, and that supplies arrive at the right place at the right time and in good condition. Traffic management advice and assistance shall be sought by and given to contracting officers and contract administrators, including property administrators who are concerned with the movement of Government property to, from, and between plants of contractors and subcontractors. Requiring activities should consider transportation factors before submitting purchase requests and should give purchasing activities instructions so that they are able to evaluate all applicable traffic management factors.

(b) As used in this subpart the term "United States" does not include Alaska or Hawaii.

§ 1.1302 Place of delivery.

§ 1.1302–1 Shipments within the United States.

Unless there are valid reasons to the contrary, the procurement of supplies from sources within the United States for ultimate delivery to destinations within the United States shall be in accordance with the following policy:

(a) When it is estimated that a contract will require no shipment to a single destination which will equal a minimum carload or truckload lot, delivery shall be on the basis of all transportation charges paid to destination;

(b) When it is estimated that a contract will require a shipment of a minimum carload or truckload lot, delivery shall be on the basis of whichever of the following is more advantageous to the Government:

(1) At the Government's option, f.o.b. carrier's equipment, wharf, or freight station at a specified city or shipping point at or near contractor's plant; or

(2) All transportation charges paid to destination. Solicitations shall provide that bidders or offerors may make bids or proposals on either or both of these bases. In the absence of specific information to the contrary, a minimum carload or truckload lot shall be deemed to be approximately 20,000 pounds.

§ 1.1302–2 Shipments from the United States for oversea delivery.

Unless there are valid reasons to the contrary, purchases of supplies originat-

ing within the United States for ultimate delivery to destinations outside the United States, regardless of the quantity of the shipment, shall be made on the basis of delivery at the Government's option, f.o.b. carrier's equipment, wharf, or freight station at a specified city or shipping point at or near contractor's plant. This policy applies to supplies shipped either directly to a port area for export or to storage areas for subsequent reshipment to a port area for export.

§ 1.1302–3 Shipments originating outside the United States.

Selection of place of delivery for shipments originating outside the United States shall be in accordance with procedures prescribed by the Department concerned.

§ 1.1303 Quantity analysis.

When additional quantities of the item being purchased can be transported at no increase in transportation cost or when purchase of carload or truckload quantities will result in lower unit transportation costs, the purchasing activity should find out from the requiring activity whether there is a known requirement for additional quantities.

§ 1.1304 Commodity description.

A complete description of the commodity being purchased, including packing and packaging instructions, is necessary not only to enable the supplier to bid or quote properly on the requirement, but also for determination of proper transportation charges. In no case shall the manufacturer's part number only be shown without the appropriate descriptive nomenclature.

§ 1.1305 Delivery terms.

§ 1.1305–1 F.o.b. origin or destination.

Solicitations for supplies to be purchased either f.o.b. origin or f.o.b. destination in accordance with § 1.1302–1 (b) shall provide that bids or proposals may be submitted on either or both bases and that they will be evaluated on the basis of the lowest overall cost to the Government. Invitations for bids and requests for proposals shall include so much of the following information as is pertinent to the particular procurement and shall require prospective suppliers to furnish the Government such of the following as may be appropriate:

(a) Method of shipment, such as rail, water, air, or truck;

(b) Minimum quantities or lots, such as carloads, truckloads, less than carloads, or less than truckloads (Where appropriate, the solicitation should elicit information of the minimum size of the shipment which the prospective supplier will make, so that the evaluation of transportation most may be on a realistic basis. The prospective supplier should be cautioned that, if he tenders shipments in lesser quantities, he may be charged with any resulting excess cost.);

(c) Guaranteed shipping weight (If shipping weight and cube of items to be procured are not shown in the solicitation, prospective suppliers should be required to furnish this information so that proper transportation costs can be computed. The prospective supplier should be cautioned that, if actual shipping weights or cubes vary from the guarantees, he may be charged with any resulting excess cost.);

(d) Packing, crating and other preparations;

(e) Transit privileges (§ 1.1308); and

(f) Any other shipping information required for evaluation.

§ 1.1305–2 F.o.b. destination.

Generally, solicitations for supplies to be purchased f.o.b. destination shall provide that supplies shall be delivered, all transportation charges paid by the contractor, to the specified destination. The solicitation shall inform prospective suppliers of any known shortage of transportation facilities at destination or other factors which may affect the supplier's transportation costs. When f.o.b. destination bids only are desired, the invitation for bids shall specify that bids submitted on a basis other than f.o.b. destination will be rejected as nonresponsive.

§ 1.1305–3 F.o.b. origin.

Generally, solicitations for supplies to be purchased f.o.b. origin shall provide for delivery, at the Government's option, f.o.b. carrier's equipment, wharf, or freight station at a city or shipping point to be specified by the bidder or offeror at or near the contractor's plant. This will enable the military traffic management offices, in issuing routing instructions, to select the mode of transportation which will provide the required service at the lowest cost. The solicitation shall state that bids or proposals will be evaluated on the basis of the lowest overall cost to the Government, taking account of transportation costs to the Government from point of origin to the designated destinations. Thus, when material is to be purchased f.o.b. origin in accordance with § 1.1302–2 for ultimate delivery to known destinations outside the United States, the solicitation will state that bids or proposals will be evaluated so as to take into account the cost to the Government of shipment from the point of origin to the overseas destinations. Contracting officers shall request the appropriate transportation officer to furnish any transportation rates and port handling charges required for use in evaluating bids or proposals. When f.o.b. origin bids only are desired, the invitations for bids will specify that bids submitted on a basis other than f.o.b. carrier's equipment, wharf, or freight stations at a specified city or shipping point at or near the contractor's plant will be rejected as nonresponsive.

§ 1.1305–4 Destination unknown.

When the exact destinations of the supplies being purchased are not known at the time bids or proposals are solicited, but the general location of the destination, such as East Coast, Middle West, or West Coast, is known, a definite place or places shall be designated as the point to which transportation costs will be computed—but only for the purpose of evaluating bids or proposals. The solicitation shall specify that bids or proposals should be submitted f.o.b. origin and that shipments will be made on Government bills of lading. The solicitation shall state:

> For the purpose of evaluating (bids) (proposals), and for no other purpose, the final destination for the supplies will be considered to be as follows: [Name destinations].

Invitations for bids shall contain a statement that bids submitted on a basis other than f.o.b. origin will be rejected as nonresponsive.

§ 1.1306 Consignment and marking instructions.

Complete consignment and marking instructions, to the extent that they are known at the time the contract is awarded, shall be included in contracts to assist in insuring that supplies will be delivered to proper destinations without delay. "Military Standard Marking of Shipments (MIL–STD–129B)" shall be consulted for proper marking instructions. In those cases where complete consignment information is not initially known, additional instructions to the contractor shall be furnished as soon as such information becomes known. In contracts which provide for delivery f.o.b. origin and shipment on Government bills of lading, consignment instructions may be limited to the mail address of the consignee, provided the contract instructions state that "Shipments other than mail shall be consigned as indicated on the Government bill of lading furnished to the Contractor." It should be noted that receiving activities may have different consignment points for the various transportation media, or even for particular carriers within a medium depending on the weight, shape, size or nature of the shipment involved.

§ 1.1307 Scheduling of deliveries to permit consolidation of shipments.

The accumulation of small shipments into carload or truckload lots will result in lower transportation costs. Also, the accumulation of small shipments into less than load shipments may result in lower transportation costs. Upon review of the purchase request, and in conjunction with the requiring or requisitioning activity, consideration shall be given to revising delivery schedules to provide for deliveries in larger quantities. In some cases, delivery schedules for supplies to be delivered to multiple destinations can be consolidated and the stop-off in transit privilege used for partial unloading at one or more points directly en route between the point of origin and the last destination.

§ 1.1308 Transit arrangements.

Transit arrangements afford an opportunity to stop carload or truckload shipments at specific intermediate points en route to the final destination in order to store, process, or fabricate, or for other purposes as specified in carriers' applicable tariffs. A single through rate from origin to final destination, plus a transit or other related charge if applicable, is charged in lieu of a combination of rates to and from the transit point which would result in higher costs. Consideration should be given to possible benefits

to the Government, through the use of such transit arrangements. Traffic management personnel can furnish necessary information and analyses of situations where such transit arrangements may be beneficial.

§ 1.1309 Rates and volume shipments.

Procurements involving planned volume movements, as defined in the Military Traffic Management Regulation (AR 55–355 c.s.; OPNAVINST 4600.8; AFM 75–2, as amended; and NAVMC 1175) shall be referred at the earliest practicable time to the appropriate military traffic management office for a determination of the reasonableness of applicable current rates and when appropriate, for negotiation of adjusted or modified rates. Generally, carriers are required by both Federal and State laws to charge all shippers equally for like transportation and associated services. However, when Government traffic possesses more favorable transportation characteristics (greater volume, heavier loading, less likelihood of damage, etc.) than commercial traffic between the same origins and destinations, freight rates are often lower for the Government traffic, as in the case of quotations under section 22 of the Interstate Commerce Act (49 U.S.C. 22) and similar tenders. Rate information necessary to properly evaluate offers shall be obtained from the appropriate military traffic office.

§ 1.1310 Crosshauling and backhauling.

Crosshauling is the shipment of material of the same kind in reverse directions. Backhauling is the shipment of material from a geographical area to or through another geographical area from which the material previously had been shipped. Crosshauling and backhauling waste transportation funds, facilities and equipment. To reduce crosshauling and backhauling, purchase requests or authorizations should contain as complete and accurate transportation (including destination) data as possible.

§ 1.1311 Unusually large or heavy shipments.

Before purchasing unusually large, heavy, high, wide, or long items, the appropriate transportation office shall be consulted in order that any transportability difficulties may be considered. Additional costs, such as the use of special equipment, excess blocking and bracing material, circuitous routing, etc., incident to these shipments shall also be considered, in conjunction with the freight rate, in determining total transportation costs.

§ 1.1312 Mode of transportation.

Generally, the military traffic management office is the proper authority to specify the mode and routing of shipments. If urgency in delivery is a factor, the appropriate military traffic management office shall be so informed in order that routing authorities may select the appropriate means of transportation.

Subpart N—Preference for United States-Flag Privately Owned Ocean Carriers

§ 1.1401 Definitions.

As used in this subpart:

(a) "Dry bulk carriers" are ships for the carriage of shipload lots of homogeneous unmarked cargoes such as grain, coal, cement and lumber;

(b) "Dry cargo liners" are ships for the carriage of heterogeneous marked cargoes in parcel lots. However, any cargo can be carried in such ships, including part cargoes of bulk items such as those mentioned above, or, when carried in deep tanks, bulk liquids such as petroleum and vegetable oils;

(c) "Tankers" are ships used for carriage of bulk liquid cargoes such as liquid petroleum products, vegetable oils and molasses;

(d) "Government vessel" means a vessel owned by the United States Government and operated directly by the Government or for the Government by an agent or contractor, including privately owned United States-flag vessels under bareboat charter to the Government;

(e) "Private United States vessels" means privately owned United States-flag commercial vessels, including such vessels when under voyage or time charter to the United States Government, and including Government-owned vessels under bareboat charter to private operators; and

(f) "United States-flag vessels" when used independently means both Government vessels and private United States vessels.

§ 1.1402 General.

It is the policy of the Department of Defense, in furtherance of the Cargo Preference Act (68 Stat. 832; 46 U.S.C. 1241(b)) and 10 U.S.C. 2631 to encourage and foster the American merchant marine. When transportation of supplies by ocean vessel is required:

(a) Private United States vessels shall be employed for the transportation of at least 50 percent of the aggregate gross tonnage per annum of the following categories of supplies:

(1) Supplies owned by the Government and in the possession of a Military Department, or of a contractor, or subcontractor of any tier, of a Military Department;

(2) Supplies for the use of the United States which are contracted for and require subsequent delivery to a Military Department but are not owned by the Government at the time of shipment; and

(3) Supplies procured, contracted for or otherwise obtained for non-reimbursable contribution to foreign assistance programs, but which are not owned by the Government at the time of shipment; provided, that this requirement shall not extend to the ocean transportation between foreign countries of supplies procured with local currency funds made available, or derived from funds made available, under the Mutual Security Act. Provided, that the allocation of gross tonnage will be computed separately for dry bulk carriers, dry cargo liners, and tankers and in such a manner as to assure fair and reasonable participation by geographic areas; and provided, that private United States vessels are available at fair and reasonable rates for such vessels;

(b) Only United States-flag vessels will be employed for the transportation of the supplies defined in paragraph (a)(1) of this section when such supplies are for the use of the Military Departments unless such vessels are not available at fair and reasonable United States-flag rates.

§ 1.1403 Applicability.

(a) For the purposes of this subpart the following geographical areas are established:

(1) *North Atlantic.* Includes Eastern Canada from the United States border to Goose Bay, Labrador; and Narsarssuak, Greenland.

(2) *U.S. East Coast.* Includes the eastern United States from the Canadian border to (and including) Key West, Florida.

(3) *U.S. Gulf.* Extends from (but excluding) Key West, Florida, to the Mexican border.

(4) *Caribbean.* Includes Bermuda; Bahamas; Cuba; Puerto Rico; Haiti; Dominican Republic; Jamaica; Windward and Leeward Islands; Trinidad; the eastern coast of Mexico; the eastern coast of Central America; and the northern coast of South America up to (and including) French Guiana.

(5) *Eastern South America.* Includes the eastern coast of South America from (but excluding) French Guiana to Cape Horn.

(6) *North Europe.* From the northern boundary of Portugal includes northern Atlantic and Biscay ports of Spain; Bordeaux/Hamburg range; Scandinavian and Baltic Sea ports; England, Wales, Scotland and Ireland; Iceland.

(7) *Mediterranean.* Azores; Canary Islands; Morocco; Spanish Morocco; Mediterranean ports extending from Gibraltar to Suez Canal; ports on Adriatic and Aegean Sea, Sea of Marmora and Black Sea; and Atlantic ports of Portugal and Spain from Gibraltar to the northern boundary of Portugal.

(8) *West Africa.* Includes the western coast of Africa from northern boundary of Rio de Oro to southern boundary of Angola and includes the Cape Verde Islands, Ascension Island and St. Helena.

(9) *South and East Africa.* Includes the southern and eastern coast of Africa and Madagascar from southern boundary of Angola on the west coast and around the south and east coast to Cape Guardafui between the Gulf of Aden and the Indian Ocean.

(10) *South Asia.* Extends from Suez to but excluding New Guinea. Includes the shores of the Red Sea; shore of the Gulf of Aden; the northern shores of the Indian Ocean including extensions such as the Persian Gulf; the East Indies including Borneo, the Celebes, etc., but excluding the Philippines and New Guinea; and the Malay Peninsula excluding Thailand.

(11) *New Guinea-Australia.* Includes Australia; New Guinea; Tasmania; New Zealand and Melanesia (comprising generally the Admiralty Islands, New Ireland, New Britain, the Solomons, New Hebrides and New Caledonia).

(12) *East Asia.* Includes the ports of the mainland and islands of East Asia from and including Thailand to and including Japan; includes the Philippines, Formosa, the Ryukyu Islands and the Bonins.

(13) *Hawaii-Central Pacific.* Hawaiian Islands; Wake/Marcus; and Oceania and Micronesia (comprising generally Palau, Marianas, Carolines, Gilberts, Fijis, Marquesas, Tuamotu Archipelago, etc., but excluding oceanic island possessions of South American countries).

(14) *Alaska and Aleutian Islands.* Includes the western coast of Canada and Alaska (including the Aleutian Islands) south of Cape Prince of Wales.

(15) *U.S. Northwest.* Includes all Oregon and Washington ports.

(16) *U.S. West Coast.* Includes all California.

(17) *Western Mexico and Central America.* Includes the western coast of Mexico and the western coast of Central America.

(18) *Western South America.* Includes the western coast of South America from (and including) the Republic of Colombia to Cape Horn, and the Pacific Islands possessions of South American countries.

(19) *Exempt areas.* (i) Alaska north of Cape Prince of Wales.

(ii) Greenland, except Narsarssuak.

(iii) Northern and eastern Canada from Goose Bay, Labrador, to Alaska.

(iv) Ports and facilities under security restrictions in otherwise nonexempt areas.

(v) Antarctica.

(b) The procedures set forth below are applicable to all ocean shipments of supplies except:

(1) Shipments in vessels assigned to United States Navy fleets other than the Military Sea Transportation Service;

(2) Shipments which originate or terminate in "exempt areas" as established in paragraph (a)(19) of this section;

(3) Shipments which originate and terminate in the same geographic area; provided, however, that supplies of the type described in § 1.1402(a)(1) shall be transported in United States-flag vessels to the extent such vessels are available at fair and reasonable United States-flag rates;

(4) Shipments aboard vessels of the Panama Canal Company; and

(5) Shipments of classified supplies where the classification prohibits the use of non-Government vessels.

§ 1.1404 Procedures.

(a) Except for those supplies obtained for non-reimbursable contributions to foreign assistance programs for which the ocean transportation is to be provided by and at the expense of the recipient government, ocean transportation of supplies owned by the Government and in the possession of either a Military Department, or a contractor, or subcontractor of any tier, of a Military Department, will be provided by the Military Sea Transportation Service. Accordingly, any contract which may involve ocean transportation of property owned by the Government and in the possession of the contractor or any of his subcontractors (including any contract under which title to property may pass to the Government prior to shipment) shall include a provision requiring the shipment of such property only as directed by the contracting officer, who shall be guided by this subchapter and applicable Departmental procedures. The Military Sea Transportation Service shall take such action as may be necessary and practicable to assure proper utilization of Government vessels and private United States vessels in accordance with this subpart, and applicable regulations. The Commander of the Military Sea Transportation Service, or his designated representative is authorized to make any determination as to availability of United States-flag vessels required to assure such proper utilization.

(b)(1) Except as provided in subparagraph (2) of this paragraph, procuring activities shall include the following clause in any contract which may involve the ocean transportation of supplies of the type described in § 1.1402(a) (2) and (3):

EMPLOYMENT OF OCEAN-GOING VESSELS (JAN. 1958)

If ocean transportation is required after the date of award of this contract in delivering any of the supplies to be furnished hereunder, the Contractor, promptly after each shipment, shall furnish to the Contracting Officer one copy of the applicable ocean shipping document indicating for each shipment made under this contract the name and nationality of the vessel and the measurement tonnage (40 cubic feet) of dry cargo, or long tons (2,240 pounds) of bulk liquid cargo, shipped on such vessel; provided, that the Contractor need not furnish such a document for any shipment of less than 120 measurement tons of dry cargo or less than 35 long tons of bulk liquid cargo; provided further, if this contract is an indefinite quantity contract or a requirement contract, the Contractor need furnish such documents only in connection with shipments made after the date of any delivery order requiring ocean transportation in delivering supplies thereunder. Additional provisions concerning the vessels to be used may be inserted in accordance with Departmental procedures.

(2) The contract shall include the following clause in lieu of the clause set forth in subparagraph (1) of this paragraph when determined by the Head of a Procuring Activity to be necessary to assure proper implementation of the policy expressed in this section or when the procuring activity has been instructed, pursuant to § 1.1405–2, that particular supplies of the type described in § 1.1402(a) (2) and (3) are to be carried exclusively in private United States vessels:

PREFERENCE FOR UNITED STATES-FLAG VESSELS (DEC. 1955)

(a) After the date of award of this contract, the Contractor shall employ privately owned United States-flag commercial vessels, and no others, in the transportation by sea of any supplies to be furnished hereunder; provided, however, that if such vessels are not available for timely shipment at fair and reasonable rates for such vessels, the Contractor shall so notify the Contracting Officer and request authorization to ship in foreign-flag vessels or designation of available United States flag-vessels. If the Contractor is authorized in writing by the Contracting Officer to ship such supplies in foreign-flag vessels, the contract price shall be equitably adjusted to reflect the difference in costs of shipping such supplies on privately owned United States-flag commercial vessels and foreign-flag vessels.

(b) Promptly after each shipment the Contractor shall furnish the Contracting Officer one copy of the applicable shipping document indicating for each shipment made under this contract the name and nationality of the vessel and the measurement tonnage (40 cubic feet) of dry cargo, or long tons (2,240 pounds) of bulk liquid cargo, shipped on such vessels.

§ 1.1405 Responsibilities.

§ 1.1405–1 Military departments.

(a) Each Military department will furnish quarterly reports to the Office of the Secretary of Defense, showing the gross tonnage of all supplies owned, procured, contracted for or otherwise obtained (computed separately for dry bulk carriers, dry cargo liners, and tankers) which have been transported by ocean carrier, during the report period. Such report will consist of two parts. Part I shall include all tonnage subject to this section except Military Assistance Program tonnage and shall also show the geographic area of origin and of destination and shall separately reflect all such information for:

(1) Private United States vessels;

(2) Government vessels (showing separately where Government vessels were used due to nonavailability of private United States vessels); and

(3) Foreign-flag vessels (showing separately where foreign vessels were used due to nonavailability of United States-flag vessels).

Part II shall show all Military Assistance Program tonnage shipped showing the geographic areas of origin and of destination and shall separately identify any shipments in other than foreign-flag vessels. Cargoes transported under arrangements made by the Military departments. Until a Department of Defense report form is announced in Part 16 of this subchapter, the Military departments will maintain records of required information and prepare reports in accordance with departmental procedures. After promulgation, the appropriate Department of Defense form will be used by the Military departments in furnishing the required reports, except that if a Military department develops, for its own use, reports which meet the requirements of this section, and which are acceptable to the Assistant Secretary of Defense (Supply and Logistics), such reports may be forwarded in lieu of the Department of Defense form.

(b) The Department of Navy will also furnish quarterly reports in two parts to the Office of the Secretary of Defense showing the gross tonnage of all supplies (computed separately for dry bulk carriers, dry cargo liners and tankers) for which transportation has been arranged by the Military Sea Transportation Service by geographic areas of origin and destination for:

(1) Private United States vessels;

(2) Government vessels (showing separately where Government vessels were

used due to nonavailability of private United States vessels); and

(3) Foreign-flag vessels (showing separately where foreign vessels were used due to nonavailability of United States flag vessels).

Part I shall include all tonnage subject to this section except Military Assistance Program tonnage, and Part II shall show Military Assistance Program tonnage.

§ 1.1405–2 Office of the Secretary of Defense.

The Office of the Secretary of Defense will evaluate the reports submitted under § 1.1405–1. In the event the evaluation of the reports indicates the need for increased utilization of private United States vessels, the Office of the Secretary of Defense shall issue appropriate instructions to the Military departments.

PART 2—PROCUREMENT BY FORMAL ADVERTISING

Sec.
2.000 Scope of part.

Subpart A—Use of Formal Advertising

Sec.
2.101 Meaning of formal advertising.
2.102 Policy.
2.102–1 General.
2.102–2 Classified procurements.
2.103 General requirements for formal advertising.
2.104 Types of contracts.
2.104–1 General.
2.104–2 Firm fixed-price contracts.
2.104–3 Fixed-price contracts with escalation.
2.104–4 Indefinite delivery type contracts.
2.105 Solicitation for informational or planning purposes.

Subpart B—Solicitation of Bids

2.201 Preparation of invitation for bids.
2.202 Miscellaneous rules for solicitation of bids.
2.202–1 Bidding time.
2.202–2 Telegraphic bids.
2.202–4 Bid samples.
2.202–5 Descriptive literature.
2.203 Methods of soliciting bids.
2.203–1 Mailing or delivery to prospective bidders.
2.203–2 Displaying in public place.
2.203–3 Publicity in newspapers and trade journals.
2.203–4 Synopses of invitation for bids.
2.204 Office of permanent record.
2.205 Bidders mailing lists.
2.205–1 Establishment of lists.
2.205–2 Removal of names from bidders mailing lists.
2.205–3 Reinstatement on bidders mailing lists.
2.205–4 Excessively long bidders mailing lists.
2.205–5 Release of bidders mailing lists.
2.206 Small business and labor surplus area set-asides.
2.207 Amendment of invitations for bids.
2.208 Cancellation of invitations before opening.
2.209 Qualified products.

Subpart C—Submission of Bids

2.301 Responsiveness of bids.
2.302 Time of bid submission.
2.303 Late bids.
2.303–1 General.
2.303–2 Consideration for award.
2.303–3 Mailed bids.
2.303–4 Telegraphic bids.
2.303–5 Hand-carried bids.
2.303–6 Notification for late bidders.
2.303–7 Disposition of late bids.
2.303–8 Records.
2.304 Modification or withdrawal of bids.
2.305 Late modifications and withdrawals.

Subpart D—Opening of Bids and Award of Contract

Sec.
2.401 Receipt and safeguarding of bids.
2.402 Opening of bids.
2.402–1 Unclassified bids.
2.402–2 Classified bids.
2.403 Recording of bids.
2.404 Rejection of bids.
2.404–1 Cancellation of invitation after opening.
2.404–2 Rejection of individual bids.
2.404–3 Notice to bidders of rejection of all bids.
2.404–4 Restrictions on disclosure of descriptive literature.
2.404–5 All or none qualifications.
2.405 Minor informalities or irregularities in bids.
2.406 Mistakes in bids.
2.406–1 General.
2.406–2 Apparent clerical mistakes.
2.406–3 Other mistakes.
2.406–4 Disclosure of mistakes after award.
2.407 Award.
2.407–1 General.
2.407–2 Responsible bidder.
2.407–3 Discounts.
2.407–4 Price escalation.
2.407–5 Other factors to be considered.
2.407–6 Equal low bids.
2.407–7 Statement and certificate of award.
2.407–8 Purchase of patented items when a patent indemnity clause is to be included in the contract.
2.407–9 Protests against award.
2.408 Information to bidders.
2.408–1 Unclassified awards.
2.408–2 Classified awards.
2.409 Synopsis of contract awards.

Subpart E—Two-Step Formal Advertising

2.501 General.
2.502 Conditions for use.
2.503 Procedures.
2.503–1 Step one.
2.503–2 Step two.

AUTHORITY: §§ 2.000 to 2.503–2 issued under R.S. 161, sec. 2202, 70A Stat. 120; 5 U.S.C. 22, 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314.

§ 2.000 Scope of part.

This part sets forth (a) the basic requirements for procurement of supplies (including construction) and services by formal advertising, (b) the information to be contained in solicitations of bids, (c) methods of soliciting bids, (d) policies with respect to the submission of bids, and (e) requirements with respect to the opening and evaluation of bids and the awarding of contracts.

Subpart A—Use of Formal Advertising

§ 2.101 Meaning of formal advertising.

Formal advertising means procurement by competitive bids and awards as prescribed in this section, and involves the following basic steps:

(a) Preparation of the invitation for bids, describing the requirements of the Government clearly, accurately, and completely, but avoiding unnecessarily restrictive specifications or requirements which might unduly limit the number of bidders. The term "invitation for bids" means the complete assembly of related documents (whether attached or incorporated by reference) furnished prospective bidders for the purpose of bidding;

(b) Publicizing the invitation for bids, through distribution to prospective bidders, posting in public places, and such other means as may be appropriate, in sufficient time to enable prospective bidders to prepare and submit bids before the time set for public opening;

(c) Submission of bids by prospective contractors, and

(d) Awarding the contract, after the bids are publicly opened to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered.

§ 2.102 Policy.

§ 2.102–1 General.

10 U.S.C. 2304(a) provides that all contracts for supplies or services, with certain stated exceptions, shall be made by formal advertising. (See Subpart B, Part 3 of this subchapter, for discussion of the exceptions.) In accordance with this requirement, procurements shall generally be made by soliciting bids from all qualified sources of supplies and services deemed necessary by the contracting officer to assure full and free competition consistent with the procurement of the required supplies or services. Current lists of bidders shall be maintained by each purchasing office in accordance with § 2.205.

§ 2.102–2 Classified procurements.

Formal advertising may be used for classified procurements provided due consideration is given to security requirements in accordance with Departmental procedures. Otherwise, classified procurements will be negotiated pursuant to 10 U.S.C. 2304(a)(12) (see § 3.212 of this subchapter) or other appropriate exception set forth in 10 U.S.C. 2304(a) (see Subpart B, Part 3 of this subchapter).

§ 2.103 General requirements for formal advertising.

No award shall be made as a result of formal advertising unless:

(a) Bids have been solicited as required by Subpart B of this part;

(b) Bids have been submitted as required by Subpart C of this part;

(c) Such business clearances and approvals as are required by Departmental procedures have been obtained; and

(d) The award is to the responsible bidder (see § 1.902 of this subchapter) whose bid is responsive to the invitation for bids and is most advantageous to the Government, price and other factors considered, as prescribed in Subpart D of this part.

§ 2.104 Types of contracts.

§ 2.104–1 General.

Contracts awarded after formal advertising shall be of the firm fixed-price type, except that fixed-price contracts with escalation may be used where some flexibility is necessary and feasible.

§ 2.104–2 Firm fixed-price contracts.

See § 3.403–1 of this subchapter.

§ 2.104–3 Fixed-price contracts with escalation.

Escalation clauses are not normally desirable, but in appropriate cases clauses providing for upward and downward revision of prices may be used, in accordance with § 3.403–2 of this subchapter, in order to protect the interest of both the Government and supplier. In addition, where the contracting officer on the basis of his knowledge of the market or previous advertisements for like items, except that a requirement for firm fixed-price bids will unnecessarily restrict competition, or unreasonably increase bid prices, invitations for bids may include an escalation clause. The clause set forth in § 7.106–1 or that in § 7.106–2 of this subchapter shall be used if applicable. If neither of these clauses is applicable, an escalation clause approved by the Department concerned may be included. Any escalation clause shall provide an escalation ceiling identical for all bidders so that each bidder is afforded an equal opportunity to bid on the escalation basis. In evaluating bids, see § 2.407–4.

§ 2.104–4 Indefinite delivery type contracts.

(a) *Definite quantity contracts.* See § 3.405–5(a) of this subchapter.

(b) *Requirements contracts.* See § 3.405–5(b) of this subchapter.

(c) *Indefinite quantity contracts.* See § 3.405–5(c) of this subchapter.

§ 2.105 Solicitation for informational or planning purposes.

See § 1.309 of this subchapter.

Subpart B—Solicitation of Bids

§ 2.201 Preparation of invitation for bids.

Forms used in inviting bids are prescribed in Subparts A and D, Part 16 of this subchapter. Invitation for bids shall contain the applicable information described in paragraphs (a) and (b) of this section and any other information required for a particular procurement.

(a) For supply and service contracts, including construction, invitation for bids shall contain the following information if applicable to the procurement involved.

(1) Invitation number.

(2) Name and address of issuing activity.

(3) Date of issuance.

(4) Date, hour, and place of opening. See § 2.202–1 concerning bidding time. Prevailing local time shall be used. Timing by the 24-hour clock shall not be used except where customary in the industry.

(5) Number of pages.

(6) Requisition or other purchase authority and appropriation and accounting data.

(7) A description of supplies or services to be furnished under each item, in sufficient detail to permit full and free competition. Such description shall comply with Subpart L, Part 1 of this subchapter, relating to specifications.

(8) The time of delivery or performance (see § 1.305 of this subchapter).

(9) Permission, if any, to submit telegraphic bids (see § 2.202–2).

(10) Permission, if any, to submit alternate bids, including alternate materials or designs (see § 1.1207 of this subchapter).

(11) A statement on the face of the invitation that "Bids must set forth full, accurate, and complete information as required by this invitation for bids (including attachments). The Penalty for making false statements in bids is prescribed in 18 U.S.C. 1001." (See §§ 2.405 and 2.406.)

(12) Bond and other guarantee requirement, if any (see Subpart A, Part 10 of this subchapter). If a bid guarantee is required, the invitation shall state that failure to submit the guarantee on time is cause for a rejection of the bid (see § 2.404–2(h)).

(13) Any authorized special provisions relating to Government-furnished property proposed to be furnished for the performance of the contract.

(14) A provision that if the bidder plans to use, in performing the work bid upon, any items of Government property in the bidder's possession under a facilities contract or other agreement independent of the invitation for bids, the bidder shall so state in the bid and, upon request of the contracting officer, submit evidence that a facilities contract or other separate agreement authorizes the bidder to use each item of such Government property for performing the work bid upon.

(15) When considered necessary by the contracting officer, a requirement that all bids must allow a period for acceptance by the Government of not less than a minimum period stipulated in the invitation for bids, and that bids offering less than the minimum stipulated acceptance period will be rejected. The minimum period so stipulated should be no more than reasonably required for evaluation of bids and other preaward processing. To accomplish the foregoing, a paragraph substantially as follows may be included in the Schedule or other appropriate place in the Invitation for Bids:

BID ACCEPTANCE PERIOD

Bids offering less than _____ days for acceptance by the Government from the date set for opening of bids will be considered nonresponsive and will be rejected.

(16) In unusual cases, where bidders are required to have special technical qualifications due to the complexity of the equipment being purchased or for some other special reason, a statement of such qualifications.

(17) Any authorized special provisions, necessary for the particular procurement, relating to such matters as progress payments (see §§ 163.73 through 163.73–6 of Subchapter E of this chapter), patent licenses, liquidated damages, profit limitations, escalation (see § 2.104–3), Buy American Act (see §§ 6.104–3 and 6.204–4 of this subchapter), etc.

(18) Such general contract provisions or conditions as are required by law or by this subchapter.

(19) Any applicable wage determinations of the Secretary of Labor (for construction, alteration, or repair contracts).

(20) If Government costs or expenditures other than bid prices are to be considered in the evaluation of bids, such factors must be identified and included.

(21) If the schedule contains a price escalation clause, the following provision:

Evaluation of bids subject to escalation: Notwithstanding the provisions of the clause entitled "Price Escalation", bids shall be evaluated on the basis of quoted prices without the allowable escalation being added. Bids which provide for a ceiling lower than that stipulated in the clause will also be evaluated on this basis. Bids which provide for escalation that may exceed the maximum escalation stipulated in the clause, or which limit or delete the downward escalation stipulated in the clause shall be rejected as nonresponsive.

(22) Unless contained elsewhere in the invitation, a statement as follows:

In the event of an inconsistency between provisions of this invitation for bids, the inconsistency shall be resolved by giving precedence in the following order: (1) The Schedule; (2) Terms and Conditions of the Invitation for Bids; (3) General Provisions; (4) other provisions of the contract, whether incorporated by reference or otherwise; (5) the Specifications.

(23) When considered necessary by the contracting officer to prevent practices prejudicial to fair and open competition, a requirement that each bidder submit with its bid an affidavit concerning its affiliation with other concerns. To accomplish the foregoing, a paragraph substantially as follows may be included in the Schedule or other appropriate place in the invitation for bids:

AFFILIATED BIDDERS

(a) Business concerns are affiliates of each other when either directly or indirectly (i) one concern controls or has the power to control the other, or (ii) a third party controls or has the power to control both.

(b) Each bidder shall submit with its bid an affidavit containing information as follows:

(i) Whether the bid has any affiliates;

(ii) The names and addresses of all affiliates of the bidder; and

(iii) The names and addresses of all persons and concerns exercising control or ownership of the bidder and any or all of its affiliates, and whether as common officers, directors, stockholders holding controlling interest, or otherwise.

Any bid which fails to include such an affidavit will be considered nonresponsive and will be rejected. (End of Notice)

(24) Directions for obtaining copies of any documents, such as plans, drawings, and specifications, which have been incorporated by reference (see § 1.1203–3 of this subchapter).

(25) Pending revisions of paragraphs 3 and 4 of the Terms and Conditions of the Invitation for Bids on the back of Standard Forms 30 (October 1957 edition) and 33 (October 1957 edition) and paragraph 7 of Standard Form 22 (March 1953 edition), include the following provision:

Late bids and modifications or withdrawals. Bids and modifications or withdrawals thereof received at the office designated in the invitation for bids after the exact time set for opening of the bids will not be considered, unless they are received before award is made and (i) are submitted by mail (or by telegraph if authorized), and (ii) it is determined by the Government that late receipt was due solely to either (A) delay in the mails (or by the telegraph company if telegraphic bids are authorized) for which the bidder was not responsible or (B) mishandling by the Government after receipt at the Government installation. However, a modification which is received from an otherwise successful bidder and which makes the terms of the bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

(b) For supply and service contracts, excluding construction, the invitation for bids shall contain the following in addition to the information required by paragraph (a) of this section if applicable to the procurement involved.

(1) Discount provisions (see § 2.407–3).

(2) The quantity of supplies or services to be furnished under each item, and any provision for quantity variation.

(3) Any requirement for prior testing and qualification of a product, when the item to be purchased is on a qualified products list (see Subpart K, Part 1, of this subchapter).

(4) Where needed for the purpose of bid evaluation, pre-award surveys, or inspection, a requirement that all bidders state the place (including the street address) from which the supplies will be furnished or where the services will be performed. Where it is reasonably anticipated that producing facilities will be used in the performance of the contracts, or where the Government requires the information, bidders will be required to state (i) the full address of principal producing facilities (if designation of such address is not feasible, a full explanation will be required), and (ii) names and addresses of owner and operator if other than bidder.

(5) Place and method of delivery (see Subpart M, Part 1, of this subchapter).

(6) Preservation, packaging, packing, and marking requirements, if any.

(7) Place, method, and conditions of inspection.

(8) If no award will be made for less than the full quantities advertised, a statement to that effect.

(9) If award is to be made by specified groups of items or in the aggregate, a statement to that effect.

(10) If the invitation gives the Government an option to increase the quantities specified, a statement of the maximum percentage of such increase.

(11) Any applicable requirements for samples or descriptive literature (see §§ 2.202–4 and 2.202–5)

§ 2.202 Miscellaneous rules for solicitation of bids.

§ 2.202–1 Bidding time.

Consistent with the needs of the Government for obtaining the supplies or services, all invitations for bids shall allow sufficient bidding time (i.e., the period of time between the date of distribution of an invitation for bids and the date set for opening of bids) to allow bidders an adequate opportunity to prepare and submit their bids. Bids shall be solicited sufficiently in advance of the opening of bids to allow bidders an adequate opportunity to prepare and submit bids As a general rule, bidding time shall be not less than 15 calendar days when procuring standard commercial articles and services and not less than 30 calendar days when procuring other than standard commercial articles or services. This rule need not be observed in special circumstances, or where the urgency for the supplies or services does not permit such delay. For items on Qualified Products Lists, see § 1.1105–1 of this subchapter.

§ 2.202–2 Telegraphic bids.

As a general rule, telegraphic bids will not be authorized. However, when in the judgment of the contracting officer, the date for the opening of bids will not allow bidders sufficient time to prepare and submit bids on the prescribed forms or when prices are subject to frequent changes, telegraphic bids may be authorized. When such bids are authorized, the schedule of the invitation for bids will require the bidder to include in the telegraphic bid specific reference to the invitation, the items or sub-items, quantities, and unit prices for which the bid is submitted, the time and place of delivery, and a statement that the bidder agrees to all the terms, conditions, and provisions of the invitation. In order that that the contract may be executed on the proper forms the invitation for bids will also provide that telegraphic bids shall be confirmed on the prescribed form and submitted promptly to the contracting officer.

§ 2.202–4 Bid samples.

(a) *Definition.* The term "bid sample" means a sample required by the invitation for bids to be furnished by a bidder as a part of his bid to show the characteristics of a product offered in his bid. The term does not include any type of sample submitted after bid opening such as one submitted to evidence a manufacturer's ability to produce.

(b) *Policy.* Bidders shall not be required to furnish a bid sample of a product they propose to furnish unless there are certain characteristics of the product which cannot be described adequately in the applicable specification or purchase description, thus necessitating the submission of a sample to assure procurement of an acceptable product. It may be appropriate to require bid samples, for example, where the procurement is of products that must be suitable from the standpoint of balance, facility of use, general "feel," color, or pattern, or that have certain other characteristics which cannot be described adequately in the applicable specifications. However,

where more than a minor portion of the characteristics of the product cannot be adequately described in the specification, the product should be procured by negotiation.

(c) *Justification.* The reasons why acceptable products cannot be procured without the submission of bid samples shall be set forth and filed in the contract file, except where such submission is required by the formal specifications (Federal, Military or other) applicable to the procurement.

(d) *Requirements of invitation for bids.* When bid samples are required, the invitation for bids shall (1) state the number and, if appropriate, the size of the samples to be submitted and otherwise fully describe the samples required, (2) state clearly the purpose for which the samples are needed and the criteria against which they will be tested or evaluated, and (3) include a provision in accordance with paragraph (e) of this section. Where samples are not considered necessary and a waiver of the sample requirements of a specification has been authorized, a statement shall be included in the invitation for bids that notwithstanding the requirements of the specifications, samples will not be required.

(e) *Invitation for bids provision.* When bid samples are required, a provision substantially as follows (modified, if appropriate, in accordance with paragraph (f) of this section) shall be included in the invitation for bids:

BID SAMPLES (OCT. 1960)

(a) Bid samples, in the quantities, sizes, etc. required for the items so indicated in this Invitation for Bids, must be furnished as a part of the bid and must be received before the time set for opening bids. Samples will be evaluated to determine compliance with the specifications or other requirements of this Invitation for Bids.

(b) Failure of samples to conform to the requirements of this Invitation for Bids will require rejection of the bid. Failure to furnish samples by the time specified in the Invitation for Bids will require rejection of the bid, except that a late sample transmitted by mail may be considered under the provision for considering late bids, as set forth elsewhere in this Invitation for Bids.

(c) Products delivered under any resulting contract shall conform to the approved sample as to the characteristics for which the sample was required and shall conform to the specifications as to all other characteristics.

(f) *Waiver of requirement for bid samples.* (1) The provision prescribed in paragraph (e) of this section may be modified to provide that the requirement for furnishing samples may be waived as to a bidder who offers a product previously or currently being procured or tested by the purchasing activity and found to comply with specification requirements conforming in every material respect with those in the current invitation for bids so that further evaluation or testing would not add to the Government's knowledge of the acceptability of the product. When provision is to be made for such a waiver, the invitation for bids provision in paragraph (e) of this section shall be modified by adding substantially the following at the end of paragraph (b) thereof: However, the requirement for furnishing samples may be waived as to a bidder if (i) the bidder states in his bid that the product he is offering to furnish is the same as a product he has offered to the purchasing activity on a previous procurement and (ii) the Contracting Officer determines that such product was previously procured or tested by the purchasing activity and found to comply with specification requirements conforming in every material respect to those in this Invitation for Bids. (Oct. 1960)

(2) Where considered necessary because of the nature of the product the provision in subparagraph (1) of this paragraph may be limited to provide for waiving the requirement only if the product offered is produced at the same plant at which the product previously procured or tested was produced.

(g) *Unsolicited samples.* If bid samples are not required by the invitation for bids, but samples are furnished with a bid, they will not be considered as qualifying the bid, and will be disregarded, unless it is clear from the bid or accompanying papers that it was the bidder's intention so to qualify the bid.

(h) *Disposition of samples.* Samples, if not destroyed in testing, shall be returned to bidders at their request and expense, unless otherwise specified in the invitation for bids. See paragraph 2(b) of the Terms and Conditions of the Invitation for Bids of Standard Forms 30 and 33.

§ 2.202–5 Descriptive literature.

(a) *Definition.* As used in this section, the term "descriptive literature" means information, such as cuts, illustrations, drawings, and brochures, which show the characteristics or construction of a product or explain its operation, furnished by a bidder as a part of his bid to describe the products offered in his bid. The term includes only information required to determine acceptability of the product, and excludes other information such as that furnished in connection with the qualifications of a bidder or for use in operating or maintaining equipment.

(b) *Policy.* Bidders shall not be required to furnish descriptive literature as a part of their bids unless the purchasing activity deems that such literature is needed to enable it to determine before award whether the products offered meet the specification requirements of the invitation for bids and to establish exactly what the bidder proposes to furnish. It may be appropriate to require descriptive literature in the procurement of highly technical or specialized equipment, or where considerations such as design or style are important in determining acceptability of the product.

(c) *Justification.* The reasons why acceptable products cannot be procured without the submission of descriptive literature shall be set forth and filed in the contract file, except where such submission is required by the formal specifications (Federal, Military, or other) applicable to the procurement.

(d) *Requirements of invitation for bids.* (1) When descriptive literature is required, the invitation for bids shall clearly state what descriptive literature is to be furnished, the purpose for which it is required, the extent to which it will be considered in the evaluation of bids, and the rules which will apply if a bidder fails to furnish it before bid opening or if the literature furnished does not comply with the requirements of the invitation for bids. Where descriptive literature is not considered necessary and a waiver of the literature requirements of a specification has been authorized, a statement shall be included in the invitation for bids that notwithstanding the requirements of the specifications, descriptive literature will not be required.

(2) Except as provided in subparagraph (3) of this paragraph, if bidders are to furnish descriptive literature as a part of their bids, a provision substantially as follows (modified, if appropriate, in accordance with paragraph (e) of this section) shall be included in the invitation for bids:

REQUIREMENT FOR DESCRIPTIVE LITERATURE (OCT. 1960)

(a) Descriptive literature as specified in this Invitation for Bids must be furnished as a part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish, for the purposes of bid evaluation and award, details of the products the bidder proposes to furnish as to [* _____].

(b) Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this Invitation for Bids will require rejection of the bid. Failure to furnish the descriptive literature by the time specified in the Invitation for Bids will require rejection of the bid, except that if the material is transmitted by mail and is received late, it may be considered under the provision for considering late bids, as set forth elsewhere in this Invitation for Bids.

*The contracting officer shall insert significant elements such as design, materials, components, or performance characteristics; or methods of manufacture, construction, assembly, or operation, as appropriate.

(3) When brand name or equal purchase descriptions are used, the requirements of this section are met by inserting in the invitation for bids the brand names provision set forth in § 1.1206 of this subchapter.

(e) *Waiver of requirements for descriptive literature.* (1) The provision prescribed in paragraph (d)(1) of this section may be modified to provide that the requirements for furnishing descriptive literature may be waived as to a particular bidder if (i) the bidder states in his bid that the product he is offering to furnish is the same as a product previously or currently being furnished to the purchasing activity and (ii) it is determined by the contracting officer that such product complies with the specification requirements of the current invitation for bids. When provision is to be made for such waiver, the invitation for bids provision in paragraph (d)(2) of this section shall be modified by adding substantially the following at the end of paragraph (b) thereof: However, the requirements for furnishing

descriptive literature may be waived as to a bidder if (i) the bidder states in his bid that the product he is offering to furnish is the same as a product he has previously furnished to the purchasing activity under a prior contract and the bidder identifies the contract, and (ii) the Contracting Officer determines that such product meets the requirements of this Invitation for Bids (Oct. 1960).

(2) If the invitation for bids contains a provision for waiver in accordance with subparagraph (1) of this paragraph, a bidder may submit his bid either on the basis of the descriptive literature to be furnished or on the basis of a previously procured product. If he elects to submit his bid on one basis, he is precluded from having his bid considered on the alternative basis after bids are opened.

(f) *Unsolicited descriptive literature.* If the furnishing of descriptive literature is not required by the invitation for bids, but such literature is furnished with a bid, it will not be considered as qualifying the bid, and will be disregarded, unless it is clear from the bid or accompanying papers that it was the bidder's intention so to qualify the bid.

(g) *Public disclosure.* See § 2.404–4 of this part for requirements with respect to restrictions on the public disclosure of descriptive literature submitted by a bidder.

§ 2.203 Methods of soliciting bids.

§ 2.203–1 Mailing or delivery to prospective bidders.

Invitations for bids (or pre-invitation notices, see § 2.205–4(c)) shall be mailed (or delivered) to a sufficient number of prospective bidders so as to elicit adequate competition. Invitations for bids shall not be mailed to persons or firms other than bona fide prospective bidders, but may be mailed for informational purposes to Government agencies, including procurement information offices. The instructions in the Joint Consolidated List of Debarred, Ineligible and Suspended Contractors and Subpart F, Part 1 of this subchapter shall be followed in soliciting bids.

§ 2.203–2 Displaying in public place.

Copies of unclassified invitations for bids shall be displayed at the purchasing office or at some other appropriate public place. (See § 1.1002 of this subchapter for availability of such copies to interested persons.)

§ 2.203–3 Publicity in newspapers and trade journals.

(a) *Free publicity.* A brief announcement of the proposed purchase may be made available for free publication to newspapers and to trade journals and magazines. Copies of unclassified invitations for bids for construction projects may be furnished to trade journals for the construction field, except that drawings, specifications, general and special provisions will not be so furnished.

(b) *Paid advertisements.* See § 1.1005 of this subchapter.

§ 2.203–4 Synopses of invitation for bids.

Synopses of Invitations for Bids shall be prepared and publicized in the Department of Commerce "Synopsis of U.S. Government Proposed Procurement, Sales and Contract Awards," in accordance with § 1.1003 of this subchapter.

§ 2.204 Office of permanent record.

Each purchasing activity is the office of permanent record for every invitation for bids issued and distributed by it and for each abstract or record of bids. The file of the invitation for bids should show the distribution which was made and the date thereof.

§ 2.205 Bidders mailing lists.

§ 2.205–1 Establishment of lists.

(a) Bidders mailing lists shall be established by purchasing activities to insure access to adequate sources of supplies and services except where the requirements of the purchasing office can be obtained within the local trade area through utilization of the simplified small purchases procedures (Subpart F, Part 3 of this subchapter), or are nonrecurring.

(b) All eligible and qualified suppliers who have submitted bidders mailing list applications, or whom the purchasing activity considers capable of filling the requirements of a particular procurement shall be placed on the appropriate bidders mailing list. Planned producers under the Industrial Readiness Planning Program shall be included on the bidders mailing list for their planned items.

(c) Bidders Mailing Lists Application (Standard Form 129) shall be used for obtaining information needed, as prescribed in § 16.810 of this subchapter, in the establishment and maintenance of bidders mailing lists. Supplemental information, where required, may be obtained by using DD Form 558–1 (Bidders Mailing List Application Supplement).

§ 2.205–2 Removal of names from bidders mailing lists.

(a) The name of each concern failing to respond to an invitation for bids, or pre-invitation notice (see § 2.205–4(c)) may be removed from the bidders mailing list without notice to the concern, but only for the item or items involved in such invitation or notice. Where a concern fails to respond to two consecutive invitations for bids or pre-invitation notices, its name shall be removed from the bidders mailing list to the extent indicated above, except that, in individual cases, concerns thus failing to respond may be retained on a bidders mailing list if such retention is considered to be in the best interest of the Government. Both actual bids and written requests for retention on the bidders mailing lists are "responses" to invitation for bids or pre-invitation notices.

(b) The names of concerns which have been (1) debarred from entering into Government contracts or (2) otherwise determined to be ineligible to receive an award of a Government contract, including ineligibility because of suspension or other disqualifications, shall be removed from the bidders mailing lists to the extent required by such debarment or other determination of ineligibility.

§ 2.205–3 Reinstatement on bidders mailing lists.

Concerns which have been removed from bidders mailing lists may be reinstated upon request or new application on Standard Form 129. No concern which is debarred or ineligible shall be reinstated during the period of debarment or ineligibility.

§ 2.205–4 Excessively long bidders mailing lists.

(a) *General.* To prevent excessive administrative costs of a procurement, mailing lists should be used in a way which will promote competition commensurate with the dollar value of the purchase to be made. As much of the mailing list will be used as is compatible with efficiency and economy in securing adequate competition as required by law. Where the number of bidders on a mailing list is considered excessive in relation to a specific procurement, the list may be reduced by any method consistent with the foregoing, including those described in paragraphs (b) and (c) of this section. The fact that less than an entire mailing list is used shall not in itself preclude furnishing of bid sets upon request made by concerns not invited to bid.

(b) *Rotation of lists.* Mailing lists may be rotated, but to do so will require considerable judgment as to whether the size of the transaction justifies rotation. In rotating a list, the interests of small business (see § 1.702(b)(2) of this subchapter) and the existence of labor surplus areas (§ 1.803(a)(5) of this subchapter) shall be considered.

(c) *Pre-invitation notices.* In lieu of initially forwarding complete bid sets, the purchasing activity may send pre-invitation notices to concerns on the mailing list. The notice shall:

(1) Specify the date by which bidders should return the notice in order to receive a complete bid set;

(2) Describe the requirement, or include the schedule of the invitation for bids, so as to furnish an item description and a condensation of other essential information providing concerns with an intelligible basis for judging whether they have an interest in the procurement; and

(3) Expressly notify concerns that if no bid is to be submitted, they should advise the issuing office in writing if future invitations are desired for the type of supplies or services involved. Drawings, plans, and specifications normally will not be furnished with the pre-invitation notice. The return date in the notice must be sufficiently in advance of the mailing date of the invitation for bids to permit an accurate estimate of the number of bid sets required. Bid sets will be sent to concerns which request them. This procedure is particularly suitable to major purchasing activities where lengthy invitations for bids and long bidders mailing lists are common.

§ 2.205–5 Release of bidders mailing lists.

(a) Except as provided in paragraph (b) of this section, the list of prospective bidders to whom invitations for bids have been furnished will not be released

outside the Department of Defense and will not be made available for inspection to individuals, firms, or trade organizations. However, such lists may be made available to other Government agencies, at their specific written request, and upon the condition that the list will not be available for inspection to anyone outside the Government.

(b) When invitations for bids for construction contracts have been issued, trade journals, prospective subcontractors, material suppliers, and others having a bona fide interest in such information, will be supplied upon request with a list of all prospective bidders furnished copies of the plans and specifications.

§ 2.206 Small business and labor surplus area set-asides.

See Subparts G and H, Part 1 of this subchapter.

§ 2.207 Amendment of invitation for bids.

(a) If after issuance of an invitation for bids but before the time for bid opening it becomes necessary to make changes in the quantity, specifications, delivery schedules, opening dates, etc., or to correct a defective or ambiguous invitation, such changes shall be accomplished by issuance of a amendment to the invitation for bids, using DD Form 1260 (see § 16.101 of this subchapter).

(b) Before issuing an amendment to an invitation for bids, the period of time remaining until bid opening and the need for extending this period by postponing the time set for opening must be considered. Where only a short time remains before the time set for bid opening, consideration should be given to notifying bidders of an extension of time by telegram or telephone. Such notification should be confirmed in the amendment.

(c) Any information given to a prospective bidder concerning an invitation for bids shall be furnished promptly to all other prospective bidders, as an amendment to the invitation, if such information is necessary to bidders in submitting bids on the invitation or if the lack of such information would be prejudicial to uninformed bidders. No award shall be made on the invitation unless such amendment has been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids.

§ 2.208 Cancellation of invitations before opening.

Cancellation of an invitation for bids usually involves the loss of time, effort, and money, spent by Government and bidders in carrying the procurement process up to the point of cancellation. Invitations for bids should not be canceled unless cancellation is clearly in the public interest, such as where there is no longer a requirement for the supplies or services or where amendments to the invitation would be of such magnitude that a new invitation is desirable. Where an invitation is canceled, bids which have been received shall be returned unopened to the bidders and a notice of cancellation shall be sent to all prospective bidders to whom invitations for bids were issued. The notice of cancellation shall identify the invitation for bids; briefly explain the reason the invitation is being canceled; and, where appropriate, assure prospective bidders that they will be given an opportunity to bid on any resolicitation of bids or any future requirements for the type of material or services involved. The cancellation shall be recorded in accordance with § 2.403.

§ 2.209 Qualified products.

See Subpart K, Part 1 of this subchapter.

Subpart C—Submission of Bids

§ 2.301 Responsiveness of bids.

(a) To be considered for award, a bid must comply in all material respects with the invitation for bids so that, both as to the method and timeliness of submission and as to the substance of any resulting contract, all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained.

(b) Telegraphic bids shall not be considered unless permitted by the invitation for bids.

(c) Bids should be filled out, executed, and submitted in accordance with the instructions which are contained in the invitation for bids. If a bidder uses its own bid form or a letter to submit a bid, the bid may be considered only if (1) the bidder accepts all the terms and conditions of the invitation, and (2) award on the bid would result in a binding contract the terms and conditions of which do not vary from the terms and conditions of the invitation.

§ 2.302 Time of bid submission.

Bids shall be submitted so as to be received in the office designated in the invitation for bids not later than the exact time set for opening.

§ 2.303 Late bids.

§ 2.303–1 General.

Bids which are received in the office designated in the invitation for bids after the exact time set for opening are "late bids," even though received only one or two minutes late. Late bids shall not be considered for award except as authorized in §§ 2.303 through 2.303–8.

§ 2.303–2 Consideration for award.

The contracting officer or his authorized representative shall determine whether late bids may be considered for award, in accordance with §§ 2.303 through 2.303–8. A late bid shall be considered for award only if received before award; and either:

(a) It is determined that its lateness was due solely to:

(1) Delay in the mails for which the bidder was not responsible, or

(2) Delay by the telegraph company for which the bidder was not responsible, where the invitation specifically authorizes telegraphic bids; or

(b) It is determined that the bid, if submitted by mail or telegram (where authorized) was received at the Government installation in sufficient time to be received at the office designated in the invitation by the time set for opening, and, except for delay due to mishandling on the part of the Government at the installation, would have been received on time at the office designated.

§ 2.303–3 Mailed bids.

(a) The time of mailing of late bids shall be determined as follows:

(1) The date and hour shown in a post office cancellation stamp or in a stamp affixed by an approved metering device shall be considered as the time of mailing;

(2) In the event of conflict between a post office cancellation stamp and a stamp of a metering device, the date and hour shown by the cancellation stamp shall govern;

(3) Except as stated in subparagraphs (5) and (6) of this paragraph, if the envelope or other outer covering shows the date but not the hour of mailing, the time of mailing shall be considered to be the last minute of the date shown;

(4) Except as stated in subparagraphs (5) and (6) of this paragraph, if the envelope or other covering does not show the date of mailing, the bid shall be presumed to have been mailed too late to be received in time;

(5) Information regarding the date and hour of mailing of registered mail, when not ascertainable from the post office cancellation stamp, shall be obtained from the postal authorities indicated in paragraph (b) of this section;

(6) Notwithstanding subparagraph (1) through (5) of this paragraph, if the bidder demonstrates the date and hour of mailing by clear and convincing evidence which includes substantiation by the post office of mailing, the date or hour thus demonstrated shall be considered the time of mailing.

(b) Information concerning the normal time for mail delivery, and concerning registered mail, shall be obtained by the purchasing activity from the postmaster, superintendent of mails, or a duly authorized representative for that purpose, of the post office serving that activity. When time permits, such information shall be obtained in writing.

§ 2.303–4 Telegraphic bids.

A late telegraphic bid shall be presumed to have been filed with the telegraph company too late to be received in time, except where the bidder demonstrates by clear and convincing evidence which includes substantiation by an authorized official of the telegraph company that the bid, as received in the office designated in the invitation for bids, was filed with the telegraph company in sufficient time to have been delivered by normal transmission procedure so as not to have been late.

§ 2.303–5 Hand-carried bids.

A late hand-carried bid, or any other late bid not submitted by mail or telegram, shall not be considered for award.

§ 2.303–6 Notification to late bidders.

Upon receipt of any late bid which is received before award, but which, on the basis of available information, cannot be considered for award under § 2.303–2(a),

the contracting officer or his authorized representative shall promptly notify the bidder that his bid was received late. Such notification shall include substantially the following information:

Your bid in response to Invitation for Bids No. ------, dated ------, was received after the time for opening specified in the Invitation. Accordingly, your bid will not be considered for award unless clear and convincing evidence is submitted promptly (and in any event before award) showing that late receipt was due solely to delay in the mails for which you were not responsible.

The foregoing notification shall be appropriately modified in the case of late telegraphic bids.

§ 2.303–7 Disposition of late bids.

Late bids which are not considered for award shall be held unopened until after award and then returned to the bidder, unless other disposition is requested or agreed to by the bidder, except that an unidentified bid may be opened solely for purposes of identification as provided in § 2.401.

§ 2.303–8 Records.

The following shall, if available, be included in the purchasing office files with respect to each late bid:

(a) A statement of the date and hour of mailing, filing, or delivery, as the case may be;

(b) A statement of the date and hour of receipt;

(c) The determination of whether or not the late bid was considered for award, with supporting facts;

(d) A statement of the disposition of the late bid; and

(e) The envelope, or other covering, if the late bid was considered for award.

§ 2.304 Modification or withdrawal of bids.

Bids may be modified or withdrawn by written or telegraphic notice received prior to the exact time set for opening. In addition, a bid may be withdrawn in person by a bidder or his authorized representative, providing his identity is made known and he signs a receipt for the bid, but only if the withdrawal is prior to the exact time set for bid opening.

§ 2.305 Late modifications and withdrawals.

(a) Modifications of bids and requests for withdrawal of bids which are received in the office designated in the invitation for bids after the exact time set for opening are "late modifications" and "late withdrawals," respectively. A late modification or late withdrawal shall be subject to the rules applicable to late bids set forth in §§ 2.303–3 through 2.303–5 and shall be considered as being effective only if it is received before award; and either:

(1) It is determined that its lateness was due solely to:

(i) Delay in the mails for which the bidder was not responsible, or

(ii) Delay in telegraphic transmission for which the bidder was not responsible; or

(2) It is determined that the modification or withdrawal, if submitted by mail or telegram, was received at the Government installation in sufficient time to be received at the office designated in the invitation by the time set for opening and, except for delay due to mishandling on the part of the Government at the installation, would have been received on time at the office designated; *Provided, however:* A modification received from an otherwise successful bidder which is favorable to the Government and which would not be prejudicial to other bidders shall be considered at any time that such modification is received.

(b) Upon receipt of any late modification or late withdrawal which is received before award, but which, on the basis of available information, cannot be considered effective under paragraph (a) of this section, the contracting officer or his duly authorized representative shall promptly notify the bidder that his modification or request for withdrawal was received late. Such notification shall include substantially the following information:

The (modification) (request for withdrawal) of your bid dated ----------, in response to Invitation for Bids No. -------, dated ----------, was received after the time for opening specified in the Invitation. Accordingly, your (modification) (request for withdrawal) will not be considered effective unless clear and convincing evidence is submitted promptly (and in any event before award) showing that late receipt was due solely to delay in the mails for which you were not responsible.

The foregoing notification shall be appropriately modified in the case of late modifications or late withdrawals received by telegraph.

(c) Late modifications or late withdrawals, which are not considered as being effective, shall be held unopened until after award and then returned to the bidder, unless other disposition is requested or agreed to by the bidder, except that:

(1) An unidentified modification or request for withdrawal may be opened solely for purposes of identification, as provided in § 2.401; and

(2) Any modification received from an otherwise successful bidder shall be opened, so as to determine whether it should be considered as stated in the proviso in paragraph (a) of this section.

(d) Records of late modifications and late withdrawals shall be maintained in accordance with the record requirements for late bids set forth in § 2.303–8.

Subpart D—Opening of Bids and Award of Contract

§ 2.401 Receipt and safeguarding of bids.

(a) All bids (including modifications) received prior to the time of opening shall be kept secure, and, except as provided in paragraph (b) of this section, unopened, in a locked bid box or safe. If an invitation for bids is canceled, or if a bidder effectively withdraws his bid in accordance with § 2.304, bids shall be returned to the bidders. Necessary precautions shall be taken to insure the security of the bid box or safe. Prior to bid opening, information concerning the identity and number of bids received shall be made available only to Government employees, and then only on a "need to know" basis. When bid samples are submitted, they shall be handled with sufficient care to prevent disclosure of characteristics before bid opening.

(b) Unidentified bids may be opened solely for the purpose of identification, and then only by an official specifically designated for this purpose by the head of the purchasing activity. If a sealed bid is opened by mistake, the person who opens the bid will immediately write his signature and position on the envelope and deliver it to the aforesaid official. This official shall immediately write on the envelope an explanation of the opening, the date and time opened, the invitation for bids number, and his signature, and shall then immediately reseal the envelope.

§ 2.402 Opening of bids.

§ 2.402–1 Unclassified bids.

(a) The official designated as the bid opening officer shall decide when the time set for bid opening has arrived, and shall so declare to those present. He shall then personally and publicly open all bids received prior to that time, and when practicable read them aloud to the persons present, and have the bids recorded. The original of each bid shall be carefully safeguarded until the abstract of bids required by § 2.403 has been made and its accuracy verified.

(b) Performance of the procedure in paragraph (a) of this section may be delegated to an assistant, but the bid opening officer remains fully responsible for the actions of such assistant.

(c) Examinations of bids by interested persons shall be permitted if it does not interfere unduly with the conduct of Government business. However, original bids shall not be allowed to pass out of the hands of a Government official unless a duplicate bid is not available for public inspection. In such case, the original bid may be examined by the public only under the immediate supervision of a Government official and under conditions which preclude possibility of a substitution, addition, deletion, or alteration in the bid. However, see § 2.404–4 with respect to public disclosure of descriptive literature or material submitted by a bidder on a restrictive basis.

§ 2.402–2 Classified bids.

The opening of classified bids shall not be accessible to the general public. Such opening may be witnessed and the results recorded by those bidder representatives (a) who have been previously cleared from a security standpoint and (b) who represent bidders which were invited to bid on the procurement. Bids shall be made available only to those persons authorized to attend the opening of bids. The procedures set forth in § 2.402–1 for safeguarding unclassified bids are also applicable to classified bids. No public record shall be made of bids or bid prices received on classified invitations for bids.

§ 2.403 Recording of bids.

The invitation number, bid opening date, general description of the procurement item, names of bidders, prices bid, and any other information required for

bid evaluation, shall be entered in an abstract or record which, except in the case of a classified procurement, shall be available for public inspection. When the items are too numerous to warrant the recording of all bids completely, an entry should be made of the opening date, invitation number, general description of the material, lot number, and the price bid. The record or abstract shall be completed as soon as practicable after the bids have been opened, and, as soon as all bids have been opened and read, the bid opening officer shall so certify in the record or abstract. If the invitation for bids is canceled before the time set for bid opening, this shall be recorded, together with a statement of the number of bids invited and the number of bids received.

§ 2.404 Rejection of bids.

§ 2.404–1 Cancellation of invitation after opening.

(a) The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsible bid, unless there is a compelling reason to reject all bids and cancel the invitation. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices. As a general rule, after opening, an invitation for bids should not be canceled and readvertised due solely to increased requirements for the items being procured; award should be made on the initial invitation for bids and the additional quantity required should be treated as a new procurement.

(b) Where it is determined prior to award but after opening that the requirements of § 1.1203 of this subchapter (relating to the availability and identification of specifications) have not been met, the invitation for bids shall be canceled. Invitations for bids may be canceled after opening but prior to award where such action is consistent with paragraph (a) of this section, and the contracting officer determines in writing that:

(1) Inadequate or ambiguous specifications were cited in the invitation;

(2) Specifications have been revised;

(3) The supplies or services being procured are no longer required;

(4) The invitation did not provide for consideration of all factors of cost to the Government, such as cost of transporting Government-furnished property to bidders' plants;

(5) Bids received indicate that the needs of the Government can be satisfied by a less expensive article differing from that on which the bids were invited;

(6) All otherwise acceptable bids received are at unreasonable prices;

(7) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith (see § 1.111 of this subchapter for reports to be made to Department of Justice); or

(8) For other reasons, cancellation is clearly in the best interest of the Government.

Determinations to cancel invitations for bids shall state the reasons therefor.

(c) Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties if any) in order to avoid the need for readvertisement.

§ 2.404–2 Rejection of individual bids.

(a) Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.

(b) Any bid which does not conform to the specifications contained or referenced in the invitation for bids shall be rejected unless the invitation authorized the submission of alternate bids and the supplies offered as alternates meet the requirements specified in the invitation.

(c) Any bid which fails to conform to the delivery schedule or permissible alternates thereto stated in the invitation for bids shall be rejected as nonresponsive.

(d) Ordinarily, a bid should be rejected where the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the Government, since to allow the bidder to impose such conditions would be prejudicial to other bidders. For example, bids shall be rejected in which the bidder:

(1) Attempts to protect himself against future changes in conditions, such as increased costs, if total possible costs to the Government cannot be determined.

(2) Fails to state a price and in lieu thereof states that price shall be "price in effect at time of delivery";

(3) States a price but qualifies such price as being subject to "price in effect at time of delivery";

(4) Where not authorized by the invitation, conditions or qualifies his bid by stipulating that his bid is to be considered only if, prior to date of award, bidder receives (or does not receive) award under a separate procurement;

(5) Requires that Government is to determine that bidder's product meets Government specification; or

(6) Limits rights of Government under any contract clause.

A low bidder may be requested to delete objectionable conditions from his bid provided these conditions do not go to the substance, as distinguished from the form, of the bid, or work an injustice on other bidders. A condition goes to the substance of a bid where it affects price, quantity, quality, or delivery of the items offered.

(e) Any bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price.

(f) Bids received from any person or concern whose name is included in the current "Joint Consolidated List of Debarred, Ineligible, and Suspended Contractors" shall be rejected if required by Subpart F, Part 1 of this subchapter.

(g) Low bids received from concerns determined to be not responsible, pursuant to § 1.904 of this subchapter, shall be rejected. (But see § 1.705–6 of this subchapter if the bidder is a small business concern.)

(h) Where a bid guarantee is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected unless failure of the bid guarantee to arrive on time was due solely to a delay in the mails for which the bidder was not responsible.

(i) The originals of all rejected bids, and any written findings with respect to such rejection, shall be preserved with the papers relating to the procurement.

§ 2.404–3 Notice to bidders of rejection of all bids.

When he determines to reject all bids, the contracting officer shall notify each bidder that all bids have been rejected, stating the reason for such action.

§ 2.404–4 Restrictions on disclosure of descriptive literature.

(a) When a bid is accompanied by descriptive literature (as defined in § 2.202–5(a)), and the bidder imposes a restriction that such literature may not be publicly disclosed, such restriction renders the bid nonresponsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered or those elements of the bid which relate to quantity, price and delivery terms. The provisions of this paragraph do not apply to unsolicited descriptive literature submitted by a bidder if such literature does not qualify the bid (see § 2.202–5(f)).

(b) Descriptive literature restricted by a bidder against public disclosure shall not be disclosed in a manner which would contravene the restriction without permission of the bidder.

§ 2.404–5 All or none qualifications.

Unless the invitation for bids so provides, a bid is not rendered nonresponsive by the fact that the bidder specifies that award will be accepted only on all, or a specified group, of the items included in the invitation for bids. However, bidders shall not be permitted to withdraw or modify "all or none" qualifications after bid opening since such qualification is substantive and affects the rights of other bidders.

§ 2.405 Minor informalities or irregularities in bids.

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids, not affecting the price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not be prejudicial to other bidders. The contracting officer shall either give to the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid, or, waive any such deficiency where

it is to the advantage of the Government. Examples of minor informalities or irregularities include:

(a) Failure of the bidder to return the number of copies of signed bids required by the invitation;

(b) Failure to furnish required information concerning the number of the bidders' employees;

(c) Failure of a bidder to sign his bid, but only if:

(1) The firm submitting the bid has formally adopted or authorized the execution of documents by typewritten, printed, or rubber stamped signature and submits evidence of such authorization and the bid carries such a signature, or

(2) The unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid document such as the submission of a bid guarantee with bid, or a letter signed by the bidder with the bid referring to and clearly identifying the bid itself; and

(d) Failure of a bidder to acknowledge receipt of an amendment to an invitation for bids but only if:

(1) The bid received clearly indicates that the bidder received the amendment, such as where the amendment added another item to the invitation for bid and the bidder submitted a bid thereon, or

(2) The amendment clearly would have no effect on price, quality, quantity, or delivery, such as an amendment correcting a typographical mistake in the name of the Government purchasing activity.

§ 2.406 Mistakes in bids.

§ 2.406–1 General.

After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes, and in cases where the contracting officer has reason to believe that a mistake may have been made, he shall request from the bidder a verification of the bid, calling attention to the suspected mistake. If the bidder alleges a mistake, the matter shall be processed in the manner set forth below. Such actions shall be taken prior to award.

§ 2.406–2 Apparent clerical mistakes.

Any clerical mistake apparent on the face of a bid may be corrected by the contracting officer prior to award, if the contracting officer has first obtained from the bidder verification of the bid actually intended. Examples of such apparent mistakes are: obvious error in placing decimal point; obvious discount errors (for example—1 percent 10 days, 2 percent 20 days, 5 percent 30 days); obvious reversal of the price f.o.b. destination and the price f.o.b. factory; obvious error in designation of unit. Correction shall be reflected in the award document.

§ 2.406–3 Other mistakes.

(a) The Departments are authorized to make the following administrative determinations in connection with mistakes in bids, other than apparent clerical mistakes, alleged after opening of bids and prior to award.

(1) Where the bidder requests permission to withdraw a bid and clear and convincing evidence establishes the existence of a mistake, a determination permitting the bidder to withdraw his bid may be made.

(2) However, if the evidence is clear and convincing both as to the existence of the mistake and as to the bid actually intended, and if the bid, both as uncorrected and as corrected, is the lowest received, a determination may be made to correct the bid and not permit its withdrawal.

(3) Where the bidder requests permission to correct a mistake in his bid and clear and convincing evidence establishes both the existence of a mistake and the bid actually intended, a determination permitting the bidder to correct the mistake may be made; provided that, in the event such correction would result in displacing one or more lower bids, the determination shall not be made unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself. If the evidence is clear and convincing only as to the mistake, but not as to the intended bid, a determination permitting the bidder to withdraw his bid may be made.

(4) Where the evidence is not clear and convincing that the bid as submitted was not the bid intended, a determination may be made requiring that the bid be considered for award in the form submitted.

(b) Authority for making the determinations described in paragraph (a)(1) of this section may be delegated, without power of redelegation, to any purchasing activity having legal counsel available. Authority for making the determinations described in paragraph (a)(2), (3) and (4) of this section may be delegated, without power of redelegation as set forth below:

(1) Department of the Army: To the Chief, Contracts Branch, Deputy Chief of Staff for Logistics; Chief of Engineers; Chief of Ordnance; The Quartermaster General.

(2) Department of the Navy: To the Director, Contracts Division, Bureau of Yards and Docks; the Assistant Chief for Purchasing, Bureau of Supplies and Accounts.

(3) Department of the Air Force: To the Staff Judge Advocate, Headquarters, Air Materiel Command.

(c) Each proposed determination shall have the concurrence of legal counsel within the Department concerned prior to issuance.

(d) To support correction of an allegedly erroneous bid subsequent to opening, the records submitted by the contracting officer in accordance with Departmental procedures shall contain the best available evidence conclusively establishing not only the existence of the error, but its nature, how it occurred, and what the bidder actually intended to bid. A mere statement that the administrative officials themselves are satisfied that an error was made is insufficient.

(e) In order to assure compliance with paragraph (d) of this section, suspected or alleged mistakes in bids will be processed as follows:

(1) In the case of any suspected mistake in bid, the contracting officer will immediately contact the bidder in question calling attention to the suspected mistake, and request verification of his bid. If the bid is verified, the contracting officer will consider the bid as originally submitted. If the time for acceptance of bids is likely to expire before a decision can be made, the contracting officer shall request all bidders whose bids may become eligible for award to extend the time for acceptance of their bids. If the bidder whose bid is believed erroneous does not grant such extension of time, the bid shall be considered as originally submitted. If a bidder alleges a mistake, the contracting officer will advise the bidder to make a written request indicating his desire to withdraw or modify the bid. The request must be supported by statements (sworn statements if possible) concerning the alleged mistake and shall include all pertinent evidence such as bidder's file copy of the bid, the original work sheets and other data used in preparing the bid, subcontractors' quotations, if any, published price lists, and any other evidence which conclusively establishes the existence of the error, the manner in which it occurred, and the bid actually intended.

(2) Where the bidder fails or refuses to furnish evidence in support of a suspected or alleged mistake, the contracting officer shall consider the bid as submitted unless the amount of the bid is so far out of line with the amounts of other bids received or with the amount estimated by the agency or determined by the contracting officer to be reasonable, or there are other indications of error so clear, as reasonably to justify the conclusion that acceptance of the bid would be unfair to the bidder or to other bona fide bidders. The attempts made to obtain the information required and the action taken with respect to the bid shall be fully documented.

(3) Where the bidder furnishes evidence in support of an alleged mistake, the contracting officer shall refer the case to the appropriate authority, together with the following data:

(i) A signed copy of the bid involved;

(ii) A copy of the invitation for bids and any specifications or drawings relevant to the alleged mistake;

(iii) An abstract or record of the bids received;

(iv) A written request by the bidder to withdraw, or modify the bid, together with the bidder's written statement and supporting evidence (such as work sheets, or other data used in preparing the bid) of the existence of the mistake and manner in which it occurred, and supporting evidence of the bid actually intended;

(v) A written statement by the contracting officer setting forth (*a*) a description of the supplies or services involved, (*b*) the expiration date of the bid in question and of the other bids submitted, (*c*) specific information as to how and when the mistake was alleged, (*d*) a summary of the evidence submitted by the bidder, (*e*) in the event only one

bid was received, a quotation of the most recent contract price for the supplies involved, or, in the absence of a recent contract for the item, the contracting officer's estimate of a fair price for the item, and (*f*) any additional evidence considered pertinent. The statement shall recommend that either the bid be considered for award in the form submitted, or the bidder be authorized to withdraw the bid, or the bidder be authorized to modify the bid.

When time is of the essence because of the expiration of bids or otherwise, the contracting officer may refer the case by telegraph or telephone to the designated authority. Ordinarily, contracting officers will not refer mistake in bid cases by telegraph or telephone to the designated authority, when the determinations set forth in paragraph (a) (2) and (3) of this section are applicable, since actual examination is generally necessary to determine whether the evidence presented is clear and convincing.

(f) Nothing contained in this section prevents a Department from submitting doubtful cases to the Comptroller General for advance decision.

(g) A signed copy of the administrative determination authorizing withdrawal or modification of the bid made in accordance with paragraph (a) of this section shall accompany the General Accounting Office copy of the contract awarded. Each Department shall maintain records of all administrative determinations made in accordance with paragraph (a) of this section, together with a complete statement of the facts involved and the action taken in each case. Copies of all administrative determinations will be included in the contract file.

§ 2.406–4 Disclosure of mistake after award.

When a mistake in a contractor's bid is not discovered until after award, the mistake may be corrected by supplemental agreement if correcting the mistake would make the contract more favorable to the Government without changing the essential requirements of the specifications. In all other cases, where other authority within the Department concerned is lacking or inadequate, the case shall be processed in accordance with Part 17 of this subchapter or, where that part is inadequate, in accordance with Departmental procedures.

§ 2.407 Award.

§ 2.407–1 General.

Unless all bids are rejected, award shall be made by the contracting officer, within the time for acceptance specified in the bid or extension thereof, to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. If a proposed award requires approval of higher authority, such award shall not be made until approval has been obtained. Awards shall be made by mailing or otherwise furnishing to the bidder a properly executed award document (see Subpart A, Part 16 of this subchapter) or notice of award on such form as may be prescribed by the procuring activity. When a notice of award is issued, it shall be followed as soon as possible by the formal award. When more than one award results from any single invitation for bids, separate award documents shall be executed, each suitably numbered. When an award is made to a bidder for less than all the items which may be awarded to that bidder and additional items are being withheld for subsequent award, the first award to that bidder shall state that the Government may make subsequent awards on such additional items within the bidder's bid acceptance period. When two or more awards are made to a single bidder on an invitation, the copy of the successful bid marked "original" will be attached to the General Accounting Office copy and a copy marked "duplicate" will be attached to the retained office copy of the first award issued, and succeeding awards will be inscribed to indicate the number of the award to which the original and duplicate bids are attached. This is necessary for legal review and auditing in the General Accounting Office. All provisions of the invitation for bids, including any acceptable additions or changes made by a bidder in the bid, shall be clearly and accurately set forth (either expressly or by reference) in the award document, since the award is an acceptance of the bid, and the bid and the award constitute the contract.

§ 2.407–2 Responsible bidder.

Before awarding the contract, the contracting officer shall determine that a prospective contractor is responsible (see Subpart I, Part 1 of this subchapter).

§ 2.407–3 Discounts.

(a) Prior to issuing an invitation for bids (except for construction), a determination shall be made as to what minimum period for prompt payment discounts will be considered in the evaluation of bids, and such minimum periods shall be stated in the invitation for bids. In determining the minimum period for a particular procurement, consideration shall be given to:

(1) The place of delivery, inspection, and acceptance in relation to the place of payment of invoices or vouchers;

(2) The number of days required to process invoices or vouchers from receipt through payment in the normal course of business; and

(3) The need for prolonged acceptance testing or other unusual circumstances tending to retard the normal processing of invoices or vouchers.

Generally, the minimum period will be expressed in multiples of ten days; e.g., "ten calendar days," "twenty calendar days," or "thirty calendar days," since these time intervals coincide with the discount terms generally offered by industry.

(b) In determining which of several bids received is the lowest, any discount offered shall be deducted from the bid price on the assumption that the discount will be taken, unless the discount offered is for a lesser period than the minimum number of days specified in the invitation for bids (see paragraph (a) of this section). Where bids otherwise equal offer the same discount rate, the bid offering the longer discount period shall be considered as being the most advantageous to the Government. If a bid offers a prompt payment discount, but fails to specify the period in which the discount may be taken, the discount may be considered since award to the bidder gives the Government the right to deduct the discount from any payments made with reasonable promptness.

(c) If a bid offers a prompt discount for a period less than that specified in the schedule, the discount shall not be considered in the evaluation of bids. If a bid would have been the lowest bid received if the discount offered were considered, but award is not made thereon because the offered discount cannot be considered, a notation to that effect shall be made upon the abstract or record of bids and on Standard Form 1036 (Statement and Certificate of Award) (see § 2.407–7).

(d) In any case, the offered discount of the successful bidder shall form a part of the award, whether or not such discount was considered in the evaluation of his bid, and such discount shall be taken if payment is made within the discount period.

§ 2.407–4 Price escalation.

(a) Where an invitation for bids does not contain a price escalation clause, bids received which quote a price and contain a price escalation provision, with a ceiling (usually expressed in terms of a maximum percentage increase) above which the price will not escalate, will be evaluated on the maximum possible escalation of the quoted base price. Bids which contain escalation with no ceiling shall be rejected unless a clear basis for evaluation exists.

(b) Where an invitation for bids contains a price escalation clause and no bidder takes exception to the escalation provisions, bids shall be evaluated on the basis of the quoted prices without the allowable escalation being added. Where a bidder increases the maximum percentage of escalation stipulated in the invitation for bids or limits the downward escalation provisions of the invitation, the bid will be rejected as nonresponsive. Where a bidder deletes the escalation clause from his bid, the bid will be rejected as nonresponsive since the downward escalation provisions are thereby limited. Where a bidder decreases the maximum percentage of escalation stipulated in the invitation for bids, the bid shall be evaluated at the base price on an equal basis with bids that do not reduce the stipulated ceiling. However, if after evaluation, the bidder offering the lower ceiling is in a position to receive the award, the award shall reflect the lower ceiling.

§ 2.407–5 Other factors to be considered.

The factors set forth in paragraphs (a) through (f) of this section, among

others, may be considered in evaluating bids.

(a) Foreseeable costs or delays to the Government resulting from differences in inspection, location of supplies, transportation, etc. If pursuant to Subpart M, Part 1 of this subchapter, bids are on an f.o.b. origin basis, transportation costs to the designated destination points shall be considered in determining the lowest cost to the Government.

(b) Changes made or requested in any of the provisions of the solicitation to the extent that any such change does not constitute ground for rejection of the bid under the provisions of § 2.404 of this subpart.

(c) Advantages or disadvantages to the Government that might result from making multiple awards.

(d) Qualified products (see Subpart K, Part 1 of this subchapter).

(e) Local, State, and Federal taxes (see Part 11 of this subchapter).

(f) Origin of supplies, whether domestic or foreign, and if foreign, the application of the Buy American Act or any other prohibition on foreign purchases (see Part 6 of this subchapter).

§ 2.407–6 Equal low bids.

(a) Except as provided in subparagraphs (1) and (2) of this paragraph, when two or more low bids are equal in all respects, all factors considered, award shall be made by a drawing by lot which shall be witnessed by at least three persons and which may be attended by the bidders or their representatives.

(1) Where two or more equal low bids are received from labor surplus area concerns, or small business concerns, award shall be made in accordance with the priorities set forth in § 1.802 of this subchapter.

(2) In the case of equal low bids two or more of which have been submitted by concerns of the same priority as set forth in § 1.802 of this subchapter, award shall be made by a drawing by lot limited to such concerns.

(b) When award is to be made by drawing by lot and the information available shows that the product of a particular manufacturer has been offered by more than one bidder, a preliminary drawing by lot shall be made to ascertain which of the bidders offering the product of a particular manufacturer will be included in the final drawing to determine the award.

(c) When an award is determined by drawing by lot, the names and addresses of the three witnesses and the person supervising the drawing shall be placed on all copies of the abstract of bids or otherwise recorded.

§ 2.407–7 Statement and certificate of award.

In connection with each contract made by formal advertising, the contracting officer shall prepare and execute a statement and certificate of award on Standard Form 1036, in accordance with § 16.801 of this subchapter. Such certificate shall either state that the accepted bid was the lowest bid received, or list all lower bids and set forth reasons for their rejection. These reasons shall be set forth in such detail as is necessary to justify the award. For the purpose of this certificate, the lowest bid received is considered to be that bid which is lowest after a consideration of price factors only. The cost of transportation to the destination indicated in the invitation for bids, and any acceptable discount offered by a bidder, and if the invitation so specifies, any other Government cost factors, shall be considered price factors in determining the lowest bidder for purposes of this certificate. It is unnecessary to evaluate nonresponsive bids. In each case of equal low bids where an award is made pursuant to § 2.407–6(a) of this subpart, such certificate shall briefly recite the circumstances under which award was made. Where such award is to a small business or a labor surplus area concern the certificate shall state that it has been administratively determined that the award will further the Congressional policy with respect to small business expressed in 10 U.S.C. 2301 or will further the policy with respect to labor surplus areas, or both, as the case may be. Where an award involves a mistake in bid and the matter has been resolved by administrative action, the Standard Form 1036 will be accompanied by (a) a copy of the bidder's verification in the case of an apparent or obvious mistake or (b) the written administrative determination concerning a mistake of the type described in § 2.406–3 of this subpart. Where an award involves a mistake in bid on which the Comptroller General has rendered a decision, the certificate will contain a citation by number and date of the decision or will have a copy attached.

§ 2.407–8 Purchase of patented items when a patent indemnity clause is to be included in the contract.

When a patent indemnity clause is to be included in a contract, in accordance with the provisions of § 9.103 of this chapter, award of the contract shall not be refused to the low bidder merely because he is not the owner of or a licensee under any of the patent rights which may be involved. (See Decision B–136916, dated October 6, 1958, of the Comptroller General.) See § 10.106 of this chapter for policy concerning requirement for patent infringement bond.

§ 2.407–9 Protests against award.

(a) *General.* Contracting officers shall consider all protests or objections to the award of a contract, whether submitted before or after award. If the protest is oral and the matter cannot otherwise be resolved, written confirmation of the protest shall be requested. The protester shall be notified in writing of the final decision on the written protest.

(b) *Protests before award.* If award has not been made, the contracting officer may require that written confirmation of an oral protest be submitted by a specified time and inform the protester that award will be withheld until the specified time. If the written protest is not received by the time specified, the oral protest may be disregarded and award may be made in the normal manner unless the contracting officer, upon investigation finds that remedial action is required, in which event such action shall be taken.

(1) In appropriate cases, notice of protest will be given to bidders affected thereby. For example, when a protest against the making of an award is received and the contracting officer determines to withhold the award pending disposition of the protest, the bidders whose bids might become eligible for award should be informed of the protest and requested, before expiration of the time for acceptance of their bids, to extend the time for acceptance (with consent of sureties, if any) in order to avoid the need for readvertisement. In the event of failure to obtain such extension of bids, then consideration should be given to proceeding with award under subparagraph (3) of this paragraph.

(2) Where a protest has been lodged with the procuring agency, the views of the Office of the Comptroller General regarding the protest should be obtained before award whenever such action is considered to be desirable. Where it is known that a protest against the making of an award has been lodged directly with the Comptroller General, a determination to make award under subparagraph (3) of this paragraph must be approved at an appropriate level above that of the contracting officer, in accordance with Departmental procedures. While award need not be withheld pending final disposition by the Comptroller General of a protest, a notice of intent to make award in such circumstances shall be furnished the Comptroller General, and formal or informal advice should be obtained concerning the current status of the case prior to making the award.

(3) Where a written protest against the making of an award is received, award shall not be made until the matter is resolved unless the contracting officer determines that:

(i) The items to be procured are urgently required; or

(ii) Delivery or performance will be unduly delayed by the failure to make award promptly; or

(iii) A prompt award will otherwise be advantageous to the Government.

If award is made under subdivision (i), (ii) or (iii) of this subparagraph, the contracting officer shall document the file to explain the need for an immediate award, and shall give written notice of the decision to proceed with the award to the protester and, as appropriate, to others concerned.

(c) *Protests after award.* A protest received after award shall be handled in accordance with Departmental procedures.

§ 2.408 Information to bidders.

§ 2.408–1 Unclassified awards.

In the case of all unclassified formally advertised contracts, the purchasing office shall as a minimum (subject to any restrictions in Subpart F, Part 1 of this subchapter) (a) notify unsuccessful bidders promptly of the fact that their bids were not accepted, and (b) extend the appreciation of the purchasing office

for the interest the unsuccessful bidder has shown in submitting a bid. Notification to unsuccessful bidders may be either orally or in writing through the use of a form postal card or other appropriate means. Should additional information be requested, the purchasing office shall either provide the unsuccessful bidders with the name and address of the successful bidder, together with the contract price, or when workload does not permit, inform the inquirers as to the location where a copy of the abstract of bids is available for inspection. In addition, when an inquiry is made by an unsuccessful bidder who is lower in price than the successful bidder, sufficient information shall be furnished in the reply to the unsuccessful bidder to fully explain the basis for award. Where request is received concerning an unclassified invitation for bids from an inquirer who is neither a bidder nor the representative of a bidder, the purchasing office may furnish the names of successful bidders and, if requested, the prices at which awards were made. However, where such requests require so large amount of work as to interfere with the normal operations of the purchasing office, the inquirer will be advised where a copy of the abstract of bids may be seen.

§ 2.408–2 Classified awards.

In the case of all classified formally advertised contracts, the purchasing office shall (a) notify unsuccessful bidders promptly of the fact that their bids were not accepted, and (b) extend the appreciation of the purchasing office for the interest the unsuccessful bidder has shown in submitting a bid. Information with respect to the name of the successful bidder and the contract price will be furnished only to unsuccessful bidders or their properly cleared representatives and then only upon request. No information regarding a classified award may be furnished by telephone.

§ 2.409 Synopsis of contract awards.

See § 1.1004 of this subchapter.

Subpart E—Two-Step Formal Advertising

§ 2.501 General.

Two-step formal advertising is a method of procurement conducted in two phases. The first step consists of the request, submission, evaluation, and, if necessary, discussion of a technical proposal, without pricing, to determine the acceptability of the supplies or services offered. The second step consists of a formally advertised procurement, confined to those offerors who submitted an acceptable technical proposal in step one. This method of procurement requires that the contracting officer work closely with technical personnel and rely on their specialized knowledge in determining the technical requirements of the procurement and the criteria to be used in evaluating technical proposals, and in making such evaluation. An objective of the two-step procedure is to permit the development of a sufficiently descriptive statement of the Government's requirement so that subsequent procurements may be made by straight formal advertising.

§ 2.502 Conditions for use.

The two-step formal advertising method of procurement may be used when its use has been approved at a level higher than the contracting officer and when all of the following conditions are present:

(a) Available specifications or purchase descriptions are not sufficiently definite or complete to permit full and free competition without engineering evaluation and any necessary discussion of the technical aspects of the requirement to insure mutual understanding between each source and the Government;

(b) Definite criteria exist for evaluating technical proposals, such as (1) applicable design and performance requirements, (2) special requirements for operational suitability and ease of maintenance, (3) necessary background experience in development and production engineering in the general scientific and engineering areas involved, and (4) need for special skills or facilities;

(c) More than one technically qualified source is expected to be available both initially and after technical evaluation; and

(d) A firm fixed-price contract or a fixed-price contract with escalation will be used.

§ 2.503 Procedures.

§ 2.503–1 Step one.

(a) *Requests for technical proposals.* A request for technical proposals shall be distributed to qualified sources in accordance with § 1.302–2 of this chapter. In addition, the request shall be synopsized in accordance with Subpart J, Part 1 of this chapter. The request may be in the form of a letter and shall contain, as a minimum, the following information:

(1) The best practicable description of the supplies or services required;

(2) Notification of the intent to conduct the procurement in two steps and the actions involved;

(3) The requirements of the technical proposal, i.e., the necessary details such as drawings, data, presentations, etc., to be submitted;

(4) The criteria for evaluating the technical proposal (§ 2.502(b));

(5) A statement that the technical proposals shall not include prices or pricing information;

(6) The date by which the proposal must be received and a statement substantially as follows:

Late Technical Proposals. The Government reserves the right to consider technical proposals or modifications thereof received after the date specified for receipt.

(7) A statement that the Government may discuss the technical aspects of the proposal with the concern submitting the proposal;

(8) A statement that in the second step of the procurement only bids based upon technical proposals determined to be acceptable, either initially or as a result of discussions, will be considered for award; and

(9) A statement that sources submitting unacceptable technical proposals will be so notified upon completion of the technical evaluation.

(b) *Receipt and evaluation of technical proposals.* The following actions will be taken with respect to receipt and evaluation of technical proposals:

(1) Every precaution shall be taken to safeguard technical proposals against disclosure to unauthorized persons.

(2) Technical proposals submitting date marked in accordance with § 3.100 of this chapter will be accepted and handled in accordance with § 3.109(a) of this chapter.

(3) Any references to price or cost will be removed.

(4) Technical evaluation of the proposals will be based upon the criteria contained in the request for technical proposals.

(5) Technical proposals will be categorized as acceptable or unacceptable. Proposals should not be categorized as unacceptable when a reasonable effort on the part of the Government could bring the proposals to an acceptable status and increase competition. The contracting officer shall arrange for any necessary discussions with sources submitting technical proposals for the purpose of obtaining additional information or clarification which may be required. When, after discussion and submission of necessary information and clarification, technical proposals are determined to be acceptable, they will be so categorized. If, however, it is determined at any time that a technical proposal is not reasonably susceptible to being made acceptable, it should be classified as unacceptable and no discussions of it need thereafter be initiated.

(6) Upon final determination that a technical proposal is unacceptable, the contracting officer shall notify the source submitting the proposal of that fact. Upon request, the source will be given the reasons why his technical proposal is not acceptable, including a statement of whether rejection was based on failure to furnish sufficient information or on an unacceptable engineering approach.

(c) *Discontinuance.* If, as a result of the evaluation of technical proposals, it appears necessary to discontinue the two-step advertising method of procurement, the full facts and circumstances will be set forth in writing and submitted to the office which originally approved the method of procurement. If that office approves the discontinuance, each source will be notified in writing of the discontinuance and the reasons therefor.

§ 2.503–2 Step two.

Upon completion of Step One, a formally advertised procurement in accordance with Subparts B, C, and D of this part will be conducted, except that invitations for bids:

(a) Will be issued only to those sources whose technical proposals have been evaluated and determined to be acceptable under Step One;

(b) Will include the following statement:

This invitation for bids is issued pursuant to two-step formal advertising in Part 5 of Section II of the Armed Services Procurement Regulation. Bids will be accepted and considered only from those firms who have submitted acceptable technical proposals pursuant to the first step of such procedures, as initiated by _____. (Identify the Request for Technical Proposals) (Jul. 1960)

(c) Will prominently state that the supplies or services to be procured will be in accordance with the specifications and the bidder's technical proposal, as finally accepted, under the request for technical proposals. This may be accomplished in the Schedule item description by a provisions substantially in the form of the following example:

Radio Antenna, in accordance with Exhibit No. ____ dated _____ (use other description of specifications as appropriate) and your Technical Proposal _____, (insert specific identification of the bidder's proposal including any revision thereof as finally accepted) incorporated herein by reference. Nothing contained in said Technical Proposal shall constitute a waiver of any of the provisions of said Exhibit (or specifications).

(d) Will not be synopsized (see Subpart J, Part 1 of this chapter) or publicly posted (see § 2.203–2).

PART 3—PROCUREMENT BY NEGOTIATION

Sec.
3.000 Scope of part.

Subpart A—Use of Negotiation

3.100 Scope of subpart.
3.101 Negotiation as distinguished from formal advertising.
3.102 General requirements for negotiation.
3.103 Records and reports of negotiated contracts.
3.104 Aids to small business in negotiated procurement.
3.105 Aids to labor surplus area concerns in negotiated procurement.
3.106 Award information to unsuccessful offerors.
3.107 Selection of research and development contractors.
3.107–1 General.
3.107–2 Small business sources.
3.107–3 Selection of sources for solicitation.
3.107–4 Solicitation.
3.107–5 Conduct of negotiations.
3.107–6 Evaluation for award.
3.107–7 Cost and price estimates.
3.107–8 Documentation.
3.108 Negotiation of initial production contracts for technical or specialized military supplies.
3.109 Restrictions on disclosure of data in proposals.
3.110 Solicitations for informational or planning purposes.

Subpart B—Circumstances Permitting Negotiation

3.200 Scope of subpart.
3.201 National emergency.
3.201–1 Authority.
3.201–2 Application.
3.201–3 Limitation.
3.202 Public exigency.
3.202–1 Authority.
3.202–2 Application.
3.202–3 Limitation.
3.203 Purchases not more than $2,500.
3.203–1 Authority.
3.203–2 Application.
3.203–3 Limitation.
3.204 Personal or professional services.
3.204–1 Authority.
3.204–2 Application.
3.204–3 Limitation.
3.205 Services of educational institutions.
3.205–1 Authority.
3.205–2 Application.
3.205–3 Limitation.
3.206 Purchases outside the United States.
3.206–1 Authority.
3.206–2 Application.
3.207 Medicines or medical supplies.
3.207–1 Authority.
Sec.
3.207–2 Application.
3.207–3 Limitation.
3.208 Supplies purchased for authorized resale.
3.208–1 Authority.
3.208–2 Application.
3.208–3 Limitation.
3.209 Perishable or nonperishable subsistence supplies.
3.209–1 Authority.
3.209–2 Application.
3.209–3 Limitation.
3.210 Supplies or services for which it is impracticable to secure competition by formal advertising.
3.210–1 Authority.
3.210–2 Application.
3.210–3 Limitation.
3.211 Experimental, developmental, or research work.
3.211–1 Authority.
3.211–2 Application.
3.211–3 Limitation.
3.211–4 Records and reports.
3.212 Classified purchases.
3.212–1 Authority.
3.212–2 Application.
3.212–3 Limitation.
3.213 Technical equipment requiring standardization and interchangeability of parts.
3.213–1 Authority.
3.213–2 Application.
3.213–3 Limitation.
3.213–4 Records and reports.
3.214 Technical or specialized supplies requiring substantial initial investment or extended period of preparation for manufacture.
3.214–1 Authority.
3.214–2 Application.
3.214–3 Limitation.
3.215 Negotiation after advertising.
3.215–1 Authority.
3.215–2 Limitation.
3.216 Purchases in the interest of national defense or industrial mobilization.
3.216–1 Authority.
3.216–2 Application.
3.216–3 Limitation.
3.216–4 Records and reports.
3.217 Otherwise authorized by law.
3.217–1 Authority.
3.217–2 Application.
3.218 Construction work.
3.218–1 Application.
3.218–2 Limitation on authority to negotiate contracts.

Subpart C—Determinations and Findings

3.300 Scope of subpart.
3.301 Nature of determinations and findings.
3.302 Determinations and findings by the Secretary of a Department.

Sec.
3.303 Determinations and findings by the head of a procuring activity signing as "a chief officer responsible for procurement."
3.304 Determinations and findings by a Contracting Officer.
3.305 Forms of determinations and findings.
3.306 Procedure with respect to determinations and findings.
3.307 Distribution of copies of determinations and findings.
3.308 Retention of copies of determinations and findings, and of other records.

Subpart D—Types of Contracts

Sec.
3.400 Scope of subpart.
3.401 Types of contracts.
3.402 Selection of contract type.
3.403 Fixed-price-type contracts.
3.403–1 Firm fixed-price contract.
3.403–2 Fixed-price contract with escalation.
3.403–3 Fixed-price contract providing for the redetermination of price.
3.403–4 Fixed-price incentive contract.
3.404 Cost-reimbursement type contract.
3.404–1 Cost contract.
3.404–2 Cost-sharing contract.
3.404–3 Cost-plus-a-fixed-fee contract.
3.404–4 Cost-plus-incentive-fee contract.
3.405 Other types of contracts.
3.405–1 Time and materials contract.
3.405–2 Labor-hour contract.
3.405–3 Letter contract.
3.405–4 Basic agreement.
3.405–5 Indefinite delivery type contracts.
3.405–6 Open end contract.
3.406 Additional incentives.
3.406–1 General.
3.406–2 Performance-incentive contracts.
3.406–3 Contracts with value engineering incentives.

Subpart E—[Reserved]

Subpart F—Small Purchases

3.600 Scope of subpart.
3.601 Purpose.
3.602 Policy.
3.603 Competition.
3.604 Imprest funds (petty cash) method.
3.604–1 Conditions for use.
3.604–2 Documentation.
3.604–3 Cash discounts.
3.604–4 Delivery of cash purchases by suppliers.
3.605 Order-invoice-voucher method.
3.605–1 Limitations on use.
3.605–2 Examples of use.
3.606 Blanket purchase agreement method.
3.606–1 General.
3.606–2 Establishment of blanket purchase agreement.
3.606–3 Conditions for use.
3.606–4 Fiscal control.
3.607 Use of Department of Defense or departmental procurement forms.
3.608 Delegation of purchase authority.
3.609 Purchase data.

Subpart G—Negotiated Overhead Rates

3.700 Scope of subpart.
3.701 Definitions.
3.701–1 Negotiated final overhead rates.
3.701–2 Provisional overhead rates.
3.701–3 Overhead (indirect costs).
3.702 Purpose.
3.703 Applicability.
3.704 Contract clauses.
3.704–1 Contracts with commercial concerns.
3.704–2 Contracts with nonprofit and educational institutions.
3.704–3 Instructions for completing contract clauses.
3.705 Procedure.
3.706 Coordination.
3.707 Cost-sharing rates.

Subpart H—Price Negotiation Policies and Techniques

Sec.
3.800 Scope of subpart.
3.801 Basic policy.
3.801–1 General.
3.801–2 Responsibility of Contracting Officers.
3.801–3 Responsibility of other personnel.
3.802 Preparation for negotiation.
3.802–1 Product or service.
3.802–2 Selection of prospective sources.
3.802–3 Requests for proposals.
3.803 Type of contract.
3.804 Conduct of negotiations.
3.804–1 General.
3.804–2 Late proposals.
3.805 Selection of offerors for negotiation and award.
3.805–1 General.
3.805–2 Cost-reimbursement type contracts.
3.806 Cost, profit and price relationships.
3.807 Pricing techniques.
3.807–1 General.
3.807–2 Pricing individual contracts.
3.807–3 Price analysis.
3.807–4 Cost analysis.
3.807–5 Subcontracting.
3.807–6 Sole source items.
3.807–7 Certificate of current pricing data.
3.807–8 Unacceptable substitutes for pricing negotiations.
3.807–9 Specified contingencies.
3.808 Profit or fee.
3.808–1 General.
3.808–2 Factors for determining fee or profit.
3.808–3 Incentive profit or fee.
3.808–4 Minimal fees or cost sharing arrangements.
3.808–5 Fee limitation for experimental, developmental, or research work.
3.809 Audit as a pricing aid.
3.810 Exchange of information.
3.811 Record of price negotiation.

Subpart I—Subcontracting Policies and Procedures

3.900 Scope of subpart.
3.901 General.
3.902 Review of "Make or Buy" program.
3.903 Review of subcontracting and contractors' purchasing systems.
3.903–1 Contract clauses.
3.903–2 Consent to subcontracts.
3.903–3 Approval of purchasing system.
3.903–4 Review of individual subcontracts.
3.904 Additional contract clauses.

AUTHORITY: §§ 3.000 to 3.904 issued under R. S. 161, sec. 2202, 70A Stat. 120; 5 U. S. C. 22, 10 U. S. C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U. S. C. 2301–2314.

§ 3.000 Scope of part.

This part sets forth, on the basis of the provisions of and authority contained in the Armed Services Procurement Act, (a) the basic requirements for the procurement of supplies and services by means of negotiation, (b) the different circumstances under which negotiation is permitted, (c) determinations and findings that may be required before a contract is entered into by negotiation, (d) approved types of negotiated contracts and their use, (e) the authority for making advance payments under negotiated contracts, (f) procedures for effecting purchases of not more than $2,500, (g) procedures for negotiating overhead rates, and (h) price negotiation policies and techniques.

Subpart A—Use of Negotiation

§ 3.100 Scope of subpart.

This subpart deals with the nature and use of negotiation as distinguished from formal advertising, and with limitations upon that use.

§ 3.101 Negotiation as distinguished from formal advertising.

Whenever supplies or services are to be procured by negotiation, price quotations (Part 16, Subpart B), supported by statements and analyses of estimated costs or other evidence of reasonable prices and other vital matters deemed necessary by the contracting officer, shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure full and free competition consistent with the procurement of the required supplies or services, in accordance with the basic policies set forth in Subpart C of Part 1, to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. Negotiation shall thereupon be conducted, by contracting officers and their negotiators, with due attention being given to the following and any other appropriate factors:

(a) Comparison of prices quoted, and consideration of other prices for the same or similar supplies or services, with due regard to production costs, including extra-pay shift, multishift and overtime costs, and any other factor relating to price, such as profits, cost of transportation, and cash discounts;

(b) Comparison of the business reputations, capabilities, and responsibilities of the respective persons or firms who submit quotations. (See § 1.903);

(c) Consideration of the quality of the supplies or services offered, or of the same or similar supplies or services previously furnished, with due regard to the satisfaction of technical requirements;

(d) Consideration of delivery requirements (see Subpart M, Part 1 and § 1.305 of this chapter).

(e) Discriminating use of price and cost analyses (see § 16.206 of this subchapter);

(f) Investigation of price aspects of any important subcontract;

(g) Individual bargaining, by mail or by conference;

(h) Consideration of cost sharing;

(i) Effective utilization in general of the most desirable type of contract, and in particular of contract provisions relating to price redetermination (see Subpart D of this part);

(j) Consideration of the size of the business concern (see Part 1, Subpart G);

(k) Consideration as to whether the prospective supplier is a Planned Emergency Producer of the required supplies or services under the Industrial Readiness Planning Program and consideration of the extent to which industrial readiness planning has progressed, including the investment by the Government and the firm in such planning;

(l) Consideration to to whether the prospective supplier requires expansion or conversion of plant facilities;

(m) Consideration as to whether the prospective supplier will have an adequate supply of qualified labor;

(n) Consideration as to whether the prospective supplier will have an adequate supply of qualified labor;

(o) Consideration of the extent of subcontracting;

(p) Consideration of the existing and potential workload of the prospective supplier;

(q) Consideration of broadening the industrial base by the development of additional suppliers;

(r) Consideration of whether the contractor requires Government furnished property, machine tools, or facilities; or Government-operated test facilities; and

(s) Consideration of contract performance in facilities located in dispersed sites.

(t) Advantages or disadvantages to the Government that might result from making multiple awards.

§ 3.102 General requirements for negotiation.

(a) Procurement shall be made by formal advertising whenever such method is feasible and practicable under the existing conditions and circumstances even though negotiation may be authorized under Subpart B of this part.

(b) No contract shall be entered into as a result of negotiation unless or until the following requirements have been satisfied:

(1) The contemplated procurement comes within one of the circumstances permitting negotiation enumerated in Subpart B of this part;

(2) Any necessary determinations and findings prescribed in Subpart C of this part, have been made;

(3) Such business clearance or approval as is prescribed by applicable Departmental procedures has been obtained; and

(4) The prospective contractor has been determined to be responsible in accordance with Subpart I, Part 1 of this subchapter.

§ 3.103 Records and reports of negotiated contracts.

In addition to the records and reports described in § 1.302–3 of this subchapter and §§ 3.211–4 and 3.216–4, each Department is required to maintain a record of the total value of all contracts negotiated by it during each fiscal year under each of the circumstances permitting negotiation enumerated in Subpart B of this part. These records, and reports based thereon, are maintained through the Department of Defense procurement reporting system described in §§ 1.110 and 16.807 of this subchapter.

§ 3.104 Aids to small business in negotiated procurement.

See Part 1, Subpart G, of this subchapter.

§ 3.105 Aids to labor surplus area concerns in negotiated procurement.

See Part 1, Subpart H of this chapter.

§ 3.106 Award information to unsuccessful offerors.

(a) *Notice to unsuccessful offerors.* (1) Promptly after making all awards in any procurement in excess of $10,000, the contracting officer shall give written notice to the unsuccessful offerors that their proposals were not accepted, except that such notice need not be given where the contract is exclusively for experimental, development, or research work, or for subsistence, or is negotiated pursuant to 10 U.S.C. 2304(a) (4), (5), or (6) (see § 3.204, 3.205 or 3.206); or is negotiated with a foreign supplier when only foreign sources of supplies or services have been solicited. Such notice shall also include:

(i) The number of prospective contractors solicited;

(ii) The number of proposals received;

(iii) The name and address of each offeror receiving an award;

(iv) The items, quantities, and unit prices of each award; provided that, where the number of items or other factors makes the listing of unit prices impracticable, only the total contract price need be furnished; and

(v) A Statement that additional information may be requested from the contracting officer.

(2) In procurements of $10,000 or less and subject to the exceptions in subparagraph (1) of this paragraph, the information described in subparagraph (1) of this paragraph shall be furnished to unsuccessful offerors upon request.

(b) *Additional information.* Upon request, unsuccessful offerors whose offered prices were lower than those of the contractor which received the award shall be furnished the reasons why their proposals were not accepted; but in no event will an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

(c) *Classified information.* Classified information shall be furnished only in accordance with regulations governing classified information.

§ 3.107 Selection of research and development contractors.

§ 3.107–1 General.

Through its research and development programs, the Department of Defense must seek the best possible equipment, weapons, and weapon systems that can be devised and produced. This means two things. First, it means seeking the best scientific and technological sources. Second, it means unremitting efforts to increase the number of sources, and to encourage participation by small business concerns, as well as others, in Defense research and development. For the most part, the general principles and procedures which are set forth elsewhere in this subchapter apply to research and development procurement. But the objectives of research and development require a different emphasis on certain aspects of the procurement process. Some of these aspects are covered in §§ 3.107 through 3.107–8.

§ 3.107–2 Small business sources.

(a) Contracting officers, technical personnel, and small business specialists shall cooperatively seek and develop information on the technical competence of small business concerns for research and development contracts. Small business specialists shall regularly bring to the attention of contracting officers and technical personnel descriptive data, brochures, and other information as to small business concerns that are apparently competent to perform research or development work in fields in which the purchasing activity is interested.

(b) In order to cooperate with the Small Business Administration in carrying out its responsibility of assisting small business concerns to obtain contracts for research and development, contracting officers, technical personnel and small business specialists shall, upon request, provide to authorized SBA representatives information necessary to understand the Government's needs concerning research and development programs under consideration for specific future procurement actions. The SBA may provide pertinent information concerning potential small business sources developed through its investigation of the capabilities of specific firms in the particular field of research and development covered by the programs. Full evaluation shall be given to any such information in selecting qualified sources.

§ 3.107–3 Selection of sources for solicitation.

(a) Recommendations as to which potential sources are technically qualified shall be made by cognizant technical personnel after review of the data obtained in accordance with paragraph (b) of this section and, as appropriate, on the basis of discussion with potential sources (either singly or in a group), correspondence, or suitable surveys.

(b) The Departments shall continually search for and develop information on sources (including small business concerns) competent to perform research and development. Advance publicity, including use of Department of Commerce Synopsis (see § 1.1003–2 of this chapter) to the fullest extent practicable, shall be given for this purpose. The search should include (1) a review of relevant data or brochures furnished by sources seeking research and development work and (2) a cooperative effort by technical personnel, small business specialists, and contracting officers to obtain information and recommendations with respect to potential sources and to consider the desirability of seeking additional sources by advance publication of proposed procurements.

§ 3.107–4 Solicitation.

(a) In order to minimize the preparation of technical proposals, which can be both costly and wasteful of scientific or engineering manpower, contracting officers should request proposals only from sources which have been technically evaluated and found qualified to perform research and development in the specific field of science or technology involved. Where there is no substantial question as to the choice of the source, as where only one source is found fully

qualified as a result of thorough technical evaluation, solicitation may be limited to a single source. Where several sources are found fully qualified technically, proposals generally shall be solicited from each such source.

(b) In addition to paragraph (a) of this section, exploratory requests may be used to determine the existence of ideas or prior work in specific fields of research. However, the request for such information should clearly state that it does not impose any obligation on the Government or signify a firm intention of the Government to enter into a contract.

§ 3.107–5 Conduct of negotiations.

See § 3.804. The contracting officer should make certain that each prospective contractor fully understands the details of the various phases of the Government's requirement, especially the statement of work. This may be best accomplished by conferences between a prospective contractor, the contracting officer, and appropriate technical personnel particularly where there is doubt that a work statement is understood or will be interpreted correctly by prospective contractors.

§ 3.107–6 Evaluation for award.

(a) Generally, research and development contracts should be awarded to those organizations, including educational organizations, which have the highest competence in the specific field of science or technology involved. However, awards should not be made for research and development capabilities that exceed those needed for the successful performance of the work.

(b) Before determining the technical competence of prospective contractors, and recommending to the contracting officer the concern or concerns that they consider most technically competent, cognizant technical personnel shall consider the following:

(1) The contractor's understanding of the scope of the work as shown by the scientific or technical approach proposed;

(2) Availability and competence of experienced engineering, scientific, or other technical personnel;

(3) Availability, from any source, of necessary research, test, and production facilities;

(4) Experience or pertinent novel ideas in the specific branch of science or technology involved; and

(5) The contractor's willingness to devote his resources to the proposed work with appropriate diligence.

(c) In determining to whom the contract shall be awarded, the contracting officer shall consider not only technical competence, but also all other factors including management capabilities, weighing each factor in accordance with the requirements of the particular procurement.

§ 3.107–7 Cost and price estimates.

While cost or price should not be the controlling factor in choosing a contractor for a research or development contract (see § 3.805–1(d)), cost or price should not be disregarded in the choice of the contractor. It is important to determine the soundness of a proposed contractor's cost or price estimate, not only to determine whether the estimate is reasonable, but also to determine his understanding of the project and ability to organize and perform the contract. (See also § 3.805–2.)

§ 3.107–8 Documentation.

Contract files for research and development procurement shall be fully documented to include the basis and reasons for the selection of the sources solicited and for the award. Such documentation should be adequate to justify the selection of the contractor over others whose proposals, from the standpoint of some single factor (such as lower estimated costs or shorter performance time), might appear more advantageous to the Government.

§ 3.108 Negotiation of initial production contracts for technical or specialized military supplies.

(a) The production of important new technical or specialized military supplies—tanks, radar, guided missiles, aircraft, rockets, and equipment of similar complexity—generally involves development, evaluation, and initial production phases. Contracting Officers shall avoid, wherever practicable, awarding initial production contracts for supplies until completion of the development and evaluation phases. At the time of placing the initial production contract, it is essential that the Government be completely free to select the contractor as the best interests of the Government may dictate. In the placement and administration of research or development contracts, no commitments shall be made to contractors with respect to obtaining subsequent production contracts.

(b) In connection with the foregoing it may be in the best interest of the Government that the initial production contract for technical and specialized supplies be placed with the contractor responsible for the development of the design for such supplies. Accordingly, it is essential that, in placing such initial production contracts, an analysis be made of the importance to be attached to the following considerations:

(1) Extensive preliminary research and development work which can be put to most effective use in production by the research and development contractor for any of the following reasons:

(i) A need for adaptation of the newly developed equipments for quantity manufacture, and for introduction of advanced production methods, together with a significant interrelationship between the design engineering and production engineering, which will yield best results from the standpoint of performance, reliability and producibility;

(ii) The substantial time and money which would be required for another contractor to indoctrinate and train his engineering staff in the specialized techniques or novel design concepts which have been employed, thereby adding to production lead time.

(2) Continuing improvement of the equipment, concurrent with production, which can be most effectively accomplished by a single contractor because of the advantages of unified responsibility and close coordination of improved design features with production processes and equipment.

(3) Substantial time and effort which have been already expended by the development contractor in developing a prototype.

(c) Where it is in the Government's interest to award the initial production contract to the development contractor, price alone should not be allowed to dictate an award elsewhere unless a fair and reasonable price cannot be negotiated with the development contractor or unless the price advantage in award to another supplier is so substantial as to outweigh the other factors involved. This section is not to be construed to require or to prevent competitive pricing. Initial production contracts shall not be awarded to development contractors who do not have fully adequate and available financial, technical and production resources.

(d) To the extent practicable, the initial production contract should also provide for the furnishing of an initial supply of special testing equipment, special tools, demonstration sets, and manuals required for operation, maintenance and training.

(e) Contracts negotiated pursuant to (b) above shall normally cite 10 U. S. C. 2304 (a) (14) (see § 3.214) or, where more appropriate, 10 U. S. C. 2304 (a) (16) (see § 3.216).

§ 3.109 Restrictions on disclosure of data in proposals.

(a) Requests for proposals may require the offeror to submit data with its proposal which may include a design or plan for accomplishing the objectives of the procurement. Such data may include information which the offeror does not want disclosed to the public or used by the Government for any purpose other than evaluation of the proposals. Offerors shall mark each sheet of data which they so wish to restrict with the legend set forth below:

> This data furnished in response to RFP No. ------, shall not be disclosed outside the Government or be duplicated, used or disclosed in whole or in part for any purpose other than to evaluate the proposal: *Provided*, That if a contract is awarded to this offeror as a result of or in connection with the submission of such data, the Government shall have the right to duplicate, use, or disclose this data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in such data if it is obtained from another source.

Contracting officers shall not refuse to consider any proposal merely because data submitted with that proposal is so marked. Data so marked shall be used only to evaluate proposals and shall not be disclosed outside the Government without the written permission of the offeror except under the conditions provided in the legend. If it is desired to duplicate, use, or disclose the data of the offeror to which the contract is awarded, for purposes other than to evaluate the proposal, the contract should so provide in accordance with § 9.202–6 of this chapter. See § 9.201 for a description of "data" and Part 9, Subpart B in general,

for the policy, instructions and contract clauses with respect to the acquisition and use of data.

(b) The provisions of paragraph (a) of this section do not apply to procurements by formal advertising. However, see § 2.404–4 of this chapter with respect to public disclosure of descriptive literature or material submitted by a bidder on a restrictive basis.

§ 3.110 Solicitations for informational or planning purposes.

See § 1.309 of this subchapter.

Subpart B—Circumstances Permitting Negotiation

§ 3.200 Scope of subpart.

Subject to the limitations prescribed in Subpart A of this part, and pursuant to the authority of 10 U.S.C. 2304(a), procurement may be effected by negotiation under any one of the exceptions ((1) through (17) of 10 U.S.C. 2304(a)) set forth in this subpart.

§ 3.201 National emergency.

§ 3.201–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(1), purchases and contracts may be negotiated if—

It is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President.

§ 3.201–2 Application.

(a) The authority of this § 3.201 shall be used only to the extent determined by the Assistant Secretary of Defense (Supply and Logistics) to be necessary in the public interest, and then only in accordance with Departmental procedures consistent with this § 3.201.

(b) For the duration of the national emergency declared pursuant to Presidential Proclamation 2914, dated December 16, 1950, the Assistant Secretary of Defense (Supply and Logistics) has determined that only the following procurements may be made pursuant to the authority of 10 U.S.C. 2304(a)(1):

(1) Procurements made in keeping with (A) labor surplus set-aside programs, including, where no other negotiating authority is appropriate, the placement of contracts for any part of the total requirements set-aside which are not filled by awards made in accordance with the provisions of the Notice of Labor Surplus Set-Aside (see § 1.804–2 (c) of this chapter), or (B) disaster area programs;

(2) Procurements made in keeping with the small business programs (A) after unilateral determinations for set-asides, or (B) to place any part of the total requirements set-aside which are not filled by awards to small business concerns, where no other negotiating authority is appropriate (see § 1.706–7 of this chapter); and

(3) Procurements of property or services for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research involving more than $2,500 but not more than $100,000 from contractors other than educational institutions.

(c) Except as authorized in (b) above, procurements may be negotiated only when authorized by 10 U.S.C. 2304(a)(2) through 10 U.S.C. 2304(a)(17) (§§ 3.202 through 3.217), and 10 U.S.C. 2304(c) (§ 3.218); determinations and findings shall be made in accordance with 10 U.S.C. 2310 and 10 U.S.C. 2311 (subpart C of this part); and the appropriate authority shall be cited in each contract.

§ 3.201–3 Limitation.

The authority of § 3.201 shall not be used when negotiation is authorized by the provisions of § 3.206.

§ 3.202 Public exigency.

§ 3.202–1 Authority.

Pursuant to the authority of 10 U.S.C. 2304(a)(2), purchases and contracts may be negotiated if—

The public exigency will not permit the delay incident to advertising.

§ 3.202–2 Application.

In order for the authority of § 3.202 to be used, the need must be compelling and of unusual urgency, as when the Government would be seriously injured, financially or otherwise, if the supplies or services were not furnished by a certain date, and when they could not be procured by that date by means of formal advertising. The following are illustrative of circumstances with respect to which this authority may be used:

(a) Supplies or services needed at once because of a fire, flood, explosion, or other disaster;

(b) Essential equipment for or repair to a ship when such equipment or repair is needed at once for compliance with the orders of the ship;

(c) Essential equipment for or repair to aircraft grounded or about to be grounded, when such equipment or repair is needed at once for the performance of the operational mission of such aircraft.

§ 3.202–3 Limitation.

Every contract negotiated under the authority of § 3.202 shall be accompanied by a signed statement of the contracting officer justifying its use, and a copy of such statement shall be sent to the General Accounting Office with a copy of the contract negotiated and executed hereunder. The authority of § 3.202 shall not be used when negotiation is authorized by the provisions of § 3.203 or § 3.206.

§ 3.203 Purchases not more than $2,500.

§ 3.203–1 Authority.

Pursuant to 10 U. S. C. 2304 (a) (3), purchases and contracts may be negotiated if—

the aggregate amount involved is not more than $2,500.

§ 3.203–2 Application.

Purchases or contracts aggregating not more than $2,500 shall be made in accordance with subpart F of this part.

§ 3.203–3 Limitation.

The authority of § 3.203 shall not be used when negotiation is authorized by the provisions of § 3.206.

§ 3.204 Personal or professional services.

§ 3.204–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(4), purchases and contracts may be negotiated if—

For personal or professional services.

§ 3.204–2 Application.

The authority of § 3.204 shall be used only when all of the following conditions have been satisfied:

(a) If personal services, they are required to be performed by an individual contractor in person (not by a firm), or if professional services, they may be performed either by an individual contractor in person or a firm or organization;

(b) The services (1) are of a professional nature, or (2) are to be performed under Government supervision and paid for on a time basis; and

(c) Procurement of the services is authorized by law, and is effected in accordance with the requirements of any such law and in accordance with Departmental procedures.

§ 3.204–3 Limitation.

The authority of § 3.204, and the above conditions imposed upon its use, shall not apply to the procurement by negotiation of any type of services authorized under any other provision of this part.

§ 3.205 Services of educational institutions.

§ 3.205–1 Authority.

Pursuant to the authority of 10 U.S.C. 2304(a)(5), purchases and contracts may be negotiated if—

For any service to be rendered by any university, college, or other educational institution.

§ 3.205–2 Application.

The following are illustrative of circumstances with respect to which the authority of § 3.205 may be used:

(a) Educational or vocational training services to be rendered by any university, college, or other educational institution in connection with the training and education of personnel, and for necessary material, services, and supplies furnished by any such institution in connection therewith;

(b) Experimental, developmental, or research work (including services, tests, and reports necessary or incidental thereto) to be conducted by any university, college, or other educational institution, and reports furnished in connection therewith;

(c) Analyses, studies, or reports (statistical or otherwise) to be conducted by any university, college, or other educational institution.

§ 3.205–3 Limitation.

The authority of § 3.205 shall not be used when negotiation is authorized by the provisions of § 3.203 or § 3.206.

§ 3.206 Purchases outside the United States.

§ 3.206–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(6), purchases and contracts may be negotiated

if "for property or services to be procured and used outside the United States, and its Territories, possessions and Puerto Rico."

§ 3.206–2 Application.

The authority of this section shall be be used only for the procurement of:

(a) Supplies to be (1) shipped from, (2) delivered, and (3) used, or

(b) Services to be performed

outside the United States, its possessions and Puerto Rico, irrespective of the place of negotiation or execution of the contract. When the authority of this paragraph is available for the negotiation of a contract, no other negotiating authority shall be used, nor shall formal advertising be used.

§ 3.207 Medicines or medical supplies.

§ 3.207–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(7), purchases and contracts may be negotiated if—

For medicine or medical supplies.

§ 3.207–2 Application.

The authority of § 3.207 shall be used only when the following two requirements have been satisfied:

(a) Such supplies are peculiar to the field of medicine, including technical equipment such as surgical instruments, surgical and orthopedic appliances, X-ray supplies and equipment, and the like, but not including prosthetic equipment; and

(b) Whenever it is determined to be practicable, such advance publicity as is considered suitable with regard to the supplies involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for supplies or services, under this authority of § 3.207, for more than $10,000.

§ 3.207–3 Limitation.

The authority of § 3.207 shall not be used when negotiation is authorized by the provisions of § 3.203 or § 3.206.

§ 3.208 Supplies purchased for authorized resale.

§ 3.208–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(8), purchases and contracts may be negotiated if—

For property for authorized resale.

§ 3.208–2 Application.

(a) The authority of § 3.208 shall be used only for purchases for resale, where appropriated funds are involved, and ordinarily only for purchases of articles with brand names or of a proprietary nature which a selling activity believes or finds to be desired or preferred by its patrons.

(b) Whenever it is determined to be practicable, such advance publicity as is considered suitable with regard to the supplies involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for supplies or services, under the authority of § 3.208, for more than $10,000.

§ 3.208–3 Limitation.

The authority of § 3.208 shall not be used when negotiation is authorized by the provisions of § 3.203 or § 3.206.

§ 3.209 Perishable or nonperishable subsistence supplies.

§ 3.209–1 Authority.

Pursuant to 10 U. S. C. 2304 (a) (9), purchases and contracts may be negotiated if—

for perishable or nonperishable subsistence supplies.

§ 3.209–2 Application.

The authority of this § 3.209 may be used for the purchase of any and all kinds of perishable or nonperishable subsistence supplies.

§ 3.209–3 Limitation.

The authority of this § 3.209 shall not be used when negotiation is authorized by the provisions of § 3.203 or § 3.206.

§ 3.210 Supplies or services for which it is impracticable to secure competition by formal advertising.

§ 3.210–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(10), purchases and contracts may be negotiated if—

For property or services for which it is impracticable to obtain competition.

§ 3.210–2 Application.

The following are illustrative of circumstances with respect to which the authority of §§ 3.210—3.210–3 may be used:

(a) When supplies or services can be obtained from only one person or firm ("sole source of supply");

(b) When competition is precluded because of the existence of patent rights, copyrights, secret processes, control of basic raw material, or similar circumstances. However, the mere existence of such rights or circumstances does not in and of itself justify the use of the authority of §§ 3.210—3.210–3);

(c) When bids have been solicited pursuant to the requirements of Part 2 of this chapter, and no responsive bid (a responsive bid is any bid which conforms to the essential requirements of the solicitation of bids) has been received from a responsible bidder;

(d) When bids have been solicited pursuant to the requirements of Part 2 of this chapter, and the responsive bid or bids do not cover the quantitative requirements of the solicitation of bids, in which case negotiation is permitted for the remaining requirements of the solicitation of bids;

(e) When the contemplated procurement is for electric power or energy, gas (natural or manufactured), water, or other utility services;

(f) When the contemplated procurement is for training film, motion picture productions, or manuscripts;

(g) When the contemplated procurement is for technical, nonpersonal services in connection with the assembly, installation, or servicing (or the instruction of personnel therein) of equipment of a highly technical or specialized nature;

(h) When the contemplated procurement is for studies or surveys other than those which may be negotiated under § 3.205 or § 3.211;

(i) When the contemplated procurement involves maintenance, repair, alterations or inspection, in connection with any one of which types of services the exact nature or amount of the work to be done is not known;

(j) When the contemplated procurement is for stevedoring, terminal, warehousing, or switching services, and when either the rates are established by law or regulation, or the rates are so numerous or complex that it is impracticable to set them forth in the specifications of a formal solicitation of bids;

(k) When the contemplated procurement is for commercial ocean or air transportation, including time charters, space charters and voyage charters over trade routes not covered by common carriers (as to which, negotiation is authorized under the provisions of § 3.217 and section 321 of the Interstate Commerce Act of September 18, 1940, 49 U. S. C. 65), and including services for the operation of Government-owned vessels or aircraft;

(l) When the contract is for services related to the procurement of perishable subsistence such as protective storage, icing, processing, packaging, handling, and transportation, whenever it is impracticable to advertise for such services a sufficient time in advance of the delivery of the perishable subsistence;

(m) When it is impossible to draft, for a solicitation of bids, adequate specifications or any other adequately detailed description of the required supplies or services;

(n) When, under the procedures set forth in joint regulation DOD 4145.16–R, AR 743–455, NAVSANDA PUB 297, AFR 67–61, and NAVMC 1133, the contract is for storage (and related services) of household goods; or

(o) When the contemplated procurement is for parts or components being procured as replacement parts in support of equipment specially designed by the manufacturer, where data available is not adequate to assure that the part or component will perform the same function in the equipment as the part or component it is to replace.

§ 3.210–3 Limitation.

The authority of § 3.210 shall not be used when negotiation is authorized by any other authority set forth in §§ 3.201 through 3.217, except that this authority shall be used in preference to § 3.212. The authority contained in § 3.210–2(m) shall not be used in procurements in excess of $50,000 unless its use is approved in advance at a level higher than the contracting officer. Every contract that is negotiated under the authority of § 3.210 shall be accompanied by a signed statement of the contracting officer justifying its use, and indicating, in addition, whether the price, rate, or charge is fixed by law or regulation; and a copy of such statement shall be sent to the General Accounting Office with a copy of the contract negotiated and executed hereunder.

§ 3.211 Experimental, developmental, or research work.

§ 3.211–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(11), purchases and contracts may be negotiated if—

For property or services that he [the Secretary] determines to be for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research.

§ 3.211–2 Application.

The following are illustrative of circumstances with respect to which the authority of § 3.211 may be used:

(a) Contracts relating to theoretical analysis, exploratory studies, and experiment in any field of science or technology;

(b) Developmental contracts calling for the practical application of investigative findings and theories of a scientific or technical nature;

(c) Contracts for such quantities and kinds of equipment, supplies, parts, accessories, or patent rights thereto, and drawings or designs thereof, as are necessary for experiment, deevlopment, research, or test; or

(d) Contracts for services, tests, and reports necessary or incidental to experimental, developmental, or research work.

§ 3.211–3 Limitation.

The authority of § 3.211 shall not be used for negotiated contracts with educational institutions or for quantity production, except that such quantities may be purchased hereunder as are necessary to permit complete and adequate experiment, development, research or test; accordingly, research or development contracts which call for the production of a reasonable number of experimental or test models, or prototypes, shall not be regarded as contracts for quantity production. Negotiated contracts with educational institutions shall be negotiated in accordance with § 3.205. During the current national emergeny, negotiation of contracts involving more than $2,500 but not more than $100,000 with other than educational institutions for experimental, developmental, or research work shall be conducted under the authority of § 3.201–2 (b) (3). The authority of § 3.211 shall not be used when negotiation is authorized by the provisions of § 3.203 or § 3.206. In order for this authority to be used, the required determination must be made in accordance with the requirements of Subpart C of this part.

§ 3.211–4 Records and reports.

Each Military Department is required to maintain a record of the name of each contractor with whom a contract has been entered into pursuant to the authority of § 3.211, together with the amount of the contract and (with due consideration given to the national security) a description of the work required to be performed thereunder. These records, and reports based thereon, are maintained through the Department of Defense procurement reporting system described in §§ 1.110 and 16.807 of this chapter.

§ 3.212 Classified purchases.

§ 3.212–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(12), purchases and contracts may be negotiated if—

For property or services whose procurement he [the Secretary] determines should not be publicly disclosed because of their character, ingredients, or components.

§ 3.212–2 Application.

The authority of this § 3.212 may be used for purchases or contracts classified "Confidential" or higher, or where because of other considerations, the contract should not be publicly disclosed.

§ 3.212–3 Limitation.

In order for the authority of § 3.212 to be used, the required determination must be made in accordance with the requirements of Subpart C of this part. The authority of this § 3.212 shall not be used when negotiation is authorized by any other authority set forth in §§ 3.201 through 3.218, except as otherwise provided in § 3.204–3.

§ 3.213 Technical equipment requiring standardization and interchangeability of parts.

§ 3.213–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(13), purchases and contracts may be negotiated if—

For equipment that he [the Secretary] determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability.

§ 3.213–2 Application.

(a) The authority of §§ 3.213–1 to 3.213–3 may be used for procuring additional units and replacement items of specified makes and models of technical equipment and parts, which are for tactical use or for use either in Alaska, Hawaii or outside the remainder of the United States, in theaters of operations, on board naval vessels, or at advanced or detached bases; and which have been adopted as standard items of supply in accordance with procedures prescribed by each respective Department. A current or recurring procurement requirement for the item shall be present. This authority would apply, for example, whenever it is necessary:

(1) To limit the variety and quantity of parts that must be carried in stock;

(2) To make possible, by standardization, the availability of parts that may be interchanged among items of damaged equipment during combat or other emergency; or

(3) To procure from selected suppliers technical equipment which is available from a number of suppliers but which would have such varying performance characteristics (notwithstanding detailed specifications and rigid inspection) as would prevent standardization and interchangeability of parts.

(b) Before making a determination to procure specified makes and models under the authority of § 3.213, consideration shall be given to:

(1) The feasibility of economical and timely deployment on a selected geographic basis of makes and models already in supply systems;

(2) The feasibility of timely standardization of components and parts under the Defense Standardization Program;

(3) The effect upon the capability of industry to produce mobilization requirements of all Departments;

(4) The practicability of interchanging parts and cannibalizing equipment;

(5) The probability that future procurement of the selected item of equipment can be effected at reasonable prices;

(6) Whether the standardization will appreciably reduce the variety and quantity of parts that must be carried in stock;

(7) The value of similar equipment and its supporting parts on hand;

(8) The contribution of the standardization to combat support;

(9) Possible savings in training personnel and publishing technical literature;

(10) Whether the standardization will adversely affect existing coordinated military specifications and standards; and

(11) The degree to which the current design of the specified make and model has been changed from the design of equipment of the same make and model now in the supply system.

(c) In arriving at determinations to standardize under the authority of § 3.213, the originating Department shall consult with the other Departments in order to assure the full benefit of the standardization.

(d) Actions taken under the authority of § 3.213 shall be reviewed by the originating Department at least once every two years to determine whether the standardization should be continued, revised, or cancelled.

§ 3.213–3 Limitation.

The authority of § 3.213 shall not be used for initial procurements of equipment and parts, or for the purpose of selecting arbitrarily the equipment of certain suppliers; nor shall it be used unless the Secretary of a Department has determined, in accordance with the requirements of Subpart C of this part, that:

(a) The equipment constitutes technical equipment;

(b) Standardization of such equipment and interchangeability of its parts are necessary in the public interest; and

(c) Procurement of such equipment or of its parts by negotiation is necessary to assure that standardization and interchangeability.

§ 3.213–4 Records and reports.

Each Military Department shall maintain on a current basis a master list of items for which determinations and findings have been made under the authority of § 3.213. A copy of each such determination and finding shall be furnished to the Assistant Secretary of Defense (Supply and Logistics) within five days after the date thereof.

§ 3.214 Technical or specialized supplies requiring substantial initial investment or extended period of preparation for manufacture.

§ 3.214–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(14), purchases and contracts may be negotiated if—

For technical or special property that he [the Secretary] determines to require a substantial initial investment or an extended period of preparation for manufacture and for which he determines that formal advertising and competitive bidding might require duplication of investment or preparation already made, or would unduly delay the procurement of that property.

§ 3.214–2 Application.

The authority of § 3.214 may be used for procurement of technical or specialized supplies—for example: aircraft, tanks, radar, guided missiles, rockets, and similar items of equipment; major components of any of the foregoing; and any supplies of a technical or specialized nature which may be necessary for the use or operation of any of the foregoing. Such procurement generally involves:

(a) High starting costs which already have been paid for by the Government or by the supplier;

(b) Preliminary engineering and development work that would not be useful to or usable by any other supplier;

(c) Elaborate special tooling already acquired;

(d) Substantial time and effort already expended in developing a prototype or an initial production model; and

(e) Important design changes which will continue to be developed by the supplier.

The authority of § 3.214 will in general be used in situations where it is preferable to place a production contract with the supplier who had developed the equipment, and thereby either assure to the Government the benefit of the techniques, tooling, and equipment already acquired by that supplier, or avoid undue delay arising from a new supplier having to acquire such techniques, tooling and equipment.

§ 3.214–3 Limitation.

The authority of § 3.214 shall not be used unless and until the Secretary has determined, in accordance with the requirements of Subpart C of this part, that:

(a) The supplies are of a technical or specialized nature requiring a substantial investment or an extended period of preparation for manufacture; and

(b) Procurement by formal advertising and competitive bidding either—

(1) May require duplication of investment or preparation already made, or

(2) Will unduly delay procurement.

§ 3.215 Negotiation after advertising.

§ 3.215–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(15), purchases and contracts may be negotiated if—

For property or services for which he (the Secretary) determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier.

§ 3.215–2 Limitation.

The authority of § 3.215 shall not be used unless the Secretary has determined, in accordance with the requirements of Subpart C of this part, that the bid prices, after formal advertising for such supplies or services, are unreasonable or were not independently reached in open competition. Also, after such determination by the Secretary, and after rejection of all bids, no contract shall be negotiated under this authority unless:

(a) Prior notice of intention to negotiate and a reasonable opportunity to negotiate have been given by a contracting officer to each responsible bidder which submitted a bid in response to the invitation for bids;

(b) The negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the Secretary; and

(c) The negotiated price is the lowest negotiated price offered by any responsible supplier.

Moreover any evidence of bids not independently reached shall be forwarded to the Department of Justice, as provided in § 1.111 of this chapter.

§ 3.216 Purchases in the interest of national defense or industrial mobilization.

§ 3.216–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(16), purchases and contracts may be negotiated if—

He [the Secretary] determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved.

§ 3.216–2 Application.

The authority of § 3.216 may be used to effectuate such plans and programs as may be evolved under the direction of the Secretary to provide incentives to manufacturers to maintain, and keep active, engineering and design staffs and manufacturing facilities available for mass production. The following are illustrative of circumstances with respect to which this authority may be used:

(a) When procurement by negotiation is necessary to keep vital facilities or suppliers in business; or to make them available in the event of a national emergency;

(b) When procurement by negotiation with selected suppliers is necessary in order to train them in the furnishing of critical supplies to prevent the loss of their ability and employee skills, or to maintain active engineering, research, and development work; or

(c) When procurement by negotiation is necessary to maintain properly balanced sources of supply for meeting the requirements of procurement programs in the interest of industrial mobilization.

§ 3.216–3 Limitation.

The authority of § 3.216 shall not be used unless and until the Secretary has determined, in accordance with the requirements of Subpart C of this part, that:

(a) It is in the interest of national defense to have a particular plant, mine, or other facility or a particular producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency, and negotiation is necessary to that end;

(b) The interest of industrial mobilization, in case of a national emergency, would be subserved by negotiation with a particular supplier; or

(c) The interest of national defense in maintaining active engineering, research, and development, would be subserved by negotiation with a particular supplier.

§ 3.216–4 Records and reports.

Each Department is required to maintain a record of the name of each contractor with whom a contract has been entered into pursuant to the authority of § 3.216, together with the amount of the contract and (with due consideration given to the national security) a description of the work required to be performed thereunder. These records, and reports based thereon, are maintained through the Department of Defense procurement reporting system described in §§ 1.110 and 16.807 of this chapter.

§ 3.217 Otherwise authorized by law.

§ 3.217–1 Authority.

Pursuant to 10 U.S.C. 2304(a)(17), purchases and contracts may be negotiated if—

otherwise authorized by law.

§ 3.217–2 Application.

The authority of § 3.217 shall be used only if, and to the extent, approved for any Military Department and in accordance with Departmental procedures.

§ 3.218 Construction work.

§ 3.218–1 Application.

Contracts to construct or repair any building, road, sidewalk, sewer, main, or similar item, are subject to 10 U.S.C. 2304(c) and § 3.218.

§ 3.218–2 Limitation on authority to negotiate contracts.

(a) *Work in the United States.* Contracts for construction work to be performed within the United States shall be formally advertised and may not be negotiated unless authorized pursuant to the following subsections of 10 U.S.C. 2304(a): (1), (2), (3), (10), (11), (12), or (15), (see respectively, §§ 3.201, 3.202, 3.203, 3.210, 3.211, 3.212 and 3.215).

(b) *Work outside of the United States.* Contracts for construction work to be performed outside of the United States shall be formally advertised and may not

be negotiated unless authorized pursuant to subsections (1) through (17) of 10 U. S. C. 2304 (a) (§§ 3.201 through 3.217), as appropriate (note that such contracts to be performed in the Territories or possessions of the United States, and Puerto Rico, may not be negotiated pursuant to 10 U. S. C. 2304 (a) (6), (§ 3.206)).

§ 3.218–3 Citation of authority to negotiate.

Negotiated contracts for construction work shall cite as authority for their negotiation the applicable subsection (1) through (17) of 10 U.S.C. 2304(a).

Subpart C—Determinations and Findings

§ 3.300 Scope of subpart.

This subpart (a) enumerates the particular determinations and findings to be made (1) by the Secretary of any Department, (2) by the head of any procuring activity signing as "a chief officer responsible for procurement," and (3) by a Contracting Officer; and (b) sets forth the requirements to be followed with respect to such determinations and findings.

§ 3.301 Nature of determinations and findings.

The determinations and supporting findings that are referred to throughout this subchapter, usually as prerequisites to the authority of a procuring activity to enter into contracts by negotiation or to make advance payments under negotiated contracts, will in most instances be made by the Secretary of a Department. Such determinations and findings shall ordinarily be made only with respect to individual purchases or contracts, but may be made with respect to classes of purchases or contracts in special cases and then only for a specified period and in accordance with procedures prescribed by each respective Department. Certain determinations, as hereinafter provided, may be made by the head of a procuring activity signing as "a chief officer responsible for procurement" or by a Contracting Officer, but in either of these two cases only with respect to individual purchases or contracts.

§ 3.302 Determinations and findings by the Secretary of a Department.

(a) The following determinations, and written findings in support thereof, may be made only by the Secretary of a Department, and are not delegated hereunder except to the extent provided in § 3.303:

(1) The determination required by §§ 3.211 to 3.211–4, inclusive, with respect to any negotiated contract for experimental, developmental, or research work or for the manufacture or furnishing of supplies for experimentation, development, research, or test;

(2) The determination required by §§ 3.212 to 3.212–3, inclusive, with respect to any negotiated contract that should not be publicly disclosed;

(3) The determination required by §§ 3.213 to 3.213–3, inclusive, with respect to any negotiated contract for technical equipment requiring standardization and interchangeability of parts;

(4) The determination required by §§ 3.214 to 3.214–3, inclusive, with respect to any negotiated contract for technical or specialized supplies requiring a substantial initial investment or an extended period of preparation for manufacture;

(5) The determination required by §§ 3.215 to 3.215–2, inclusive, with respect to any negotiated contract entered into after advertising has proved unsatisfactory;

(6) The determination required by §§ 3.216 to 3.216–4, inclusive, with respect to any negotiated contract entered into in the interest of national defense or industrial mobilization;

(7) the determination required with respect to advance payments under any negotiated contract. (See Part 163 Subpart D of this title, Defense Contract Financing Regulations, AR 715–6, NAVEXOS P–1006 (see NPL 31–001), AFR 173–133, 17 December 1956.)

(b) In addition to the determinations in paragraph (a) of this section, the Secretary of any Department may also make any of the determinations, and written findings in support thereof, that may be made by the head of any procuring activity signing as "a chief officer responsible for procurement" or by a Contracting Officer.

§ 3.303 Determinations and findings by the head of a procuring activity signing as "a chief officer responsible for procurement."

The following determinations, and written findings in support thereof, may be made by the head of a procuring activity signing as "a chief officer responsible for procurement":

(a) The determination required by §§ 3.211 to 3.211–4, inclusive, with respect to any negotiated contract for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: *Provided*, That such contract does not obligate the Government to pay more than $25,000; and

(b) The determinations required by §§ 3.403–4, 3.404, 3.404–3 and 3.404–4 with respect to the use of a cost or a cost-plus-a-fixed-fee contract or an incentive-type contract.

§ 3.304 Determinations and findings by a contracting officer.

To the extent that the authority has been or may be granted by procedures prescribed by each respective Department, the determinations required by §§ 3.403–4, 3.404, 3.404–3, and 3.404–4 with respect to the use of a cost or a cost-plus-a-fixed-fee contract or an incentive-type contract may be made by a contracting officer: *Provided*, That any such determination shall be based upon written findings made by the Contracting Officer. Any other determinations or findings called for by this subchapter, but not required by this subchapter to be made by higher authority, may be made by a Contracting Officer in accordance with procedures prescribed by each respective Department.

§ 3.305 Forms of determinations and findings.

Each Determination and Findings—whether for (a) "Authority to Negotiate an Individual Contract," or (b) "Authority to Negotiate a Class of Contracts," or (c) "Advance Payments," or (d) "Method of Contracting," or (e) any other purpose—shall be prepared in accordance with procedures prescribed by each respective Department.

§ 3.306 Procedure with respect to determinations and findings.

Each Determination and Findings shall be approved and processed in accordance with procedures prescribed by each respective Department, except that Determinations and Findings for procurement by negotiation with respect to coordinated procurement (§ 5.1100–1 of this subchapter) shall be made in accordance with § 5.1106–2 of this subchapter.

§ 3.307 Distribution of copies of determinations and findings.

Copies of each Determination and Findings shall be distributed in accordance with procedures prescribed by each respective Department: *Provided*, That one copy thereof with respect to (a) negotiated contracts (whether by individual contract or by class of contracts), (b) advance payments, and (c) the use of a cost or a cost-plus-a-fixed-fee contract or an incentive-type contract, shall be sent to the General Accounting Office with the copy of the contract negotiated and executed thereunder.

§ 3.308 Retention of copies of determinations and findings, and of other records.

Executed originals of all determinations and findings, and copies of all supporting documents, shall be preserved in the cognizant procuring activity or in the Department concerned for six years following the date of each respective determination. Complete records with respect to all negotiated contracts shall be preserved in the cognizant procuring activity or in the Department concerned for a period of six years following final payment on each such respective contract.

Subpart D—Types of Contracts

§ 3.400 Scope of subpart.

This subpart (a) describes and defines approved types of contracts for procurement by negotiation, (b) defines the areas of applicability in which each type of contract may be used appropriately and sets forth considerations and policies governing the choice of type of contract, and (c) imposes conditions on the use of certain of the available types of contracts.

§ 3.401 Types of contracts.

Pursuant to the authority of 10 U.S.C. 2306, contracts negotiated under this Part may be of any of the types or combination of types described herein, which will promote the best interests of the

Government subject to the restrictions described below. The cost-plus-a-percentage-of-cost system of contracting shall not be used. In furtherance of this policy all prime contracts and letter contracts, on other than a firm fixed-price basis, shall by an appropriate clause prohibit cost-plus-a-percentage-of-cost subcontracts.

§ 3.402 Selection of contract type.

(a) *General.* The firm fixed-price contract shall be used unless, under the applications and limitations contained in this Subpart, the use of another type of contract is more appropriate. However, the selection of contract type is generally a matter for negotiation. The proper selection of an appropriate type of contract is of primary importance in obtaining fair and reasonable prices under all of the circumstances. The type of contract therefore has a direct effect upon the resulting price or cost to the Government. Type of contract and pricing are interrelated and should be so considered together in negotiation, in accordance with the provisions of § 3.803. In determining the type of contract to be utilized, consideration should be given to such factors as:

(1) Type and complexity of the item;

(2) Urgency of the requirement;

(3) The period of contract performance and the length of the production run;

(4) Degree of competition present;

(5) Difficulty of estimating performance costs due to such factors as the lack of firm specifications, the lack of production experience, or the instability of design;

(6) Availability of comparative price data, or lack of firm market prices or wage levels;

(7) Prior experience with the contractor;

(8) Extent and nature of subcontracting contemplated;

(9) Assumption of business risk;

(10 Technical capability and financial responsibility of the contractor; and

(11) Administrative costs of both parties.

Early agreement should be reached between the Government and the contractor on the type of contract best suited to the procurement. Except in the case of a firm fixed-price contract, contract files shall include documentation to show the reasons why the particular contract type was utilized.

(b) *Research and development.* A fixed-price contract normally should not be used to contract for research and development work unless the work to be performed can be described with a reasonable degree of definiteness, sufficient pricing information is available to assure that the contract price will be fair and reasonable, a definite period of performance can be specified, and successful performance of the contract is not dependent upon a breakthrough in the state of the art.

§ 3.403 Fixed-price type contracts.

The fixed-price type contract generally provides for a firm price, or under appropriate circumstances may provide for an adjustable price, for the supplies or services which are being procured. In providing for an adjustable price, the contract may fix a ceiling price, target price (including target cost), or minimum price. However, unless otherwise provided in the contract, any such ceiling, target, or minimum price is subject to adjustment resulting solely from the operation of any contract clause which provides for equitable adjustment, escalation, or other revision of the contract price upon the occurrence of an event or a contingency. Fixed-price contracts are of several types so designed as to facilitate proper pricing under varying circumstances.

§ 3.403–1 Firm fixed-price contract.

(a) *Description.* The firm fixed-price contract provides for a price which is not subject to any adjustment by reason of the cost experience of the contractor in the performance of the contract. This type of contract, when appropriately applied as set forth in paragraph (b) of this section, places the maximum risk and responsibility upon the contractor and affords him the greatest incentive for efficient performance with the resultant benefits in earnings. Utilization of the firm fixed-price contract imposes a minimum administrative burden on the contracting parties.

(b) *Applicability.* The firm fixed-price contract is suitable for use in procurements when stable and reasonably definite specifications are available and when fair and reasonable pricing can be achieved, such as where (1) adequate competition has made initial quotations effective; (2) prior purchases of the same or similar supplies or services provide reasonable price comparison; (3) experienced cost information or sound estimates of the probable cost of performance are available in the negotiation of contract prices; or (4) any other reliable basis for proper pricing can be utilized consistent with the purpose of this type of contract. The firm fixed-price contract is particularly suitable in the purchase of standard commercial items, modified commercial items, or military items for which adequate information on production and cost is available.

(c) *Limitation.* The firm fixed-price contract shall not be used when contingencies proposed in the contract price are considered unreasonable.

§ 3.403–2 Fixed-price contract with escalation.

(a) *Description.* The fixed-price contract with escalation provides for the upward and downward revision of the stated contract price upon the occurrence of certain contingencies which are specifically defined in the contract. These contingencies should be limited to those beyond the normal control of the contractor. The business risk of the contractor in a fixed-price contract is reduced by the inclusion of escalation provisions in which the Government agrees to revise the stated price upon the happening of the prescribed contingency. Where escalation is agreed upon, upward adjustments shall be limited by the establishment of a reasonable ceiling, and provisions will be included for downward adjustments in those instances where the prices or rates fall below the base levels provided in the contract. In the establishment of the base levels from which escalation will operate, contingency allowances shall be eliminated from the base to be set forth in the contract to the extent that escalation is provided for any particular contingency. Generally, escalation provisions are of two broad types:

(1) Price escalation provides for adjustment of the contract price on the basis of increases or decreases from an agreed upon level in published or established prices of specific items or in price levels of the contract end items.

(2) Labor and material escalation provides for adjustment of the contract price on the basis of increases or decreases from agreed standards or indices in wage rates, specific material costs, or both.

(b) *Applicability.* Use of this type of contract is appropriate where serious doubt exists as to the stability of market and labor conditions which will exist during an extended period of production and contingencies which would otherwise be included in a firm fixed-price contract are identifiable and can be covered separately by escalation. Its usefulness is limited by the difficulties inherent in its administration.

(1) Price escalation may be used under the conditions stated above when the items to which escalation will be applied are standard materials or articles normally sold at "established" or "published" prices in a competitive commercial market or are modifications thereof the prices of which can be reasonably related to the prices of such standard materials or articles.

(2) Labor and material escalation generally is suitable for use when the types and kinds of labor and material that the contractor intends to use in the performance of a contract that covers an extended period of time prevents him from accepting the full risk of possible cost increases and the Government is unwilling to accept the proposed contingency factors.

(c) *Limitation.* Escalation shall not be used to provide protection against contingencies arising from the lack of accurate estimates of the quantities of labor or material required for performance of the contract.

§ 3.403–3 Fixed-price contract providing for the redetermination of price.

(a) *General*—(1) *Description.* The fixed-price contract providing for the redetermination of price calls for the subsequent negotiated adjustment, in whole or in part, of the initially negotiated (base) price. Consistent with the particular form of price redetermination clause selected, the contract price should be adjusted upward or downward at times prescribed in the contract or at the demand of either party either during or after the period of contract performance and such adjusted price may be prospective, retroactive, or both. Price redetermination clauses provide a contractual method for shifting certain risks from the contractor to the Government in order to eliminate or mini-

mize the inclusion of contingency allowances in the price. Five types of redetermination clauses are available in accordance with the criteria for their use set forth in paragraph (b) of this section.

(2) *Applicability.* These price redetermination clauses are suitable for use in varying degrees in negotiated contracts where (i) adequate estimates of quantities of material and labor are not initially available; (ii) specifications adequate for a firm fixed-price are not initially available; (iii) sound initial estimates of total cost of performance cannot be made; (iv) effective competition or other reasonable justification of price is not available; or (v) where the use of price redetermination would otherwise materially assist in effecting fair and reasonable pricing.

(3) *Limitations.* This type of contract should not be used unless—

(i) It has been determined through negotiation that the particular type price redetermination contract fulfills more completely than any other type of contract the requirements established by the conditions surrounding the procurement.

(ii) There is at the outset, or will be available at a point early in contract performance, sufficient pricing information available to negotiate a prospective fixed or target price.

(iii) The initial price is substantially free of contingency allowances.

(iv) A firm fixed price can be established at a point substantially in advance of contract completion, except as to retroactive adjustment as provided in paragraph (b) (5) of this section.

(v) Reasonable assurance exists that contract price redetermination can be accomplished on a timely basis.

(vi) The contractor's accounting system is adequate for contract price redetermination purposes.

(vii) Cost of administration is not prohibitive.

(b) *Types of price redetermination clauses*—(1) *Prospective periodic price redeterminations at stated intervals*—(i) *Description.* This clause provides for a firm fixed price for an initial period of contract deliveries or performance and for prospective price redeterminations either upward or downward at stated intervals during the performance of the contract.

(ii) *Applicability.* This clause is appropriate for use in procurements calling for quantity production or services where it is possible to negotiate fair and reasonable firm fixed prices for the initial period but not for subsequent stated periods of contract performance. This initial period should be reasonably long so as to include the maximum deliveries and cover the longest period of contract performance for which it is possible to establish fair and reasonable prices at the time of original negotiation. The length of the prospective pricing periods should depend on the circumstances of each case and should generally range from 6 to 12 months each.

(iii) *Limitations.* This clause should be used only when the prospective pricing periods can be made to conform with the operation of the contractor's accounting system. A price ceiling may be established for this type of contract in accordance with the policy set forth in paragraph (c) of this section when appropriate.

(2) *Prospective price redeterminations on request*—(i) *Description.* This clause provides for a fixed price for the entire contract subject to limited demands by either party for prospective price redetermination either upward or downward.

(ii) *Applicability.* This clause is appropriate for use in procurements calling for quantity production or service where it is possible to negotiate fair and reasonable firm fixed prices for the entire contract but the length of contract performance makes it desirable for the parties to reserve the option to adjust price prospectively due to unforeseen causes beyond the normal risks inherent in a firm fixed-price contract.

(iii) *Limitations.* This clause should be used only when (*a*) the procurement is susceptible of being firm fixed priced for the entire contract except for contingencies due to the length of contract performance; (*b*) the initially negotiated price shall remain in effect without change for a substantial period of performance, but only in exceptional cases shall this period be less than 6 months; and (*c*) the first redetermined price and any subsequent redetermined prices shall remain in effect for a substantial portion of the remaining period of contract performance but only in exceptional cases shall price redetermination requests be provided for more frequently than every 6 months after the initial price redetermination. A price ceiling may be established for this type of contract in accordance with the policy set forth in paragraph (c) of this section when appropriate.

(3) *Retroactive and prospective price redetermination at a stated time prior to completion*—(i) *Description.* This clause provides for retroactive and prospective redetermination of prices either (*a*) upward or downward, or (*b*) downward only, at a designated time prior to completion of the contract, expressed in terms of deliveries, shop completion, a percentage of total contract performance on a cost incurred basis or any other reasonable basis. Generally, the time designated as the cutoff point for price redetermination purposes should be the earliest practicable and generally should not exceed 20 percent of deliveries, 20 percent of shop completion, or 40 percent of cost of performance on a cost incurred basis, as compared with the initial estimates. The redetermined price may apply to all supplies or services delivered under the contract.

(ii) *Applicability.* This clause is appropriate for use in contracts when it is impracticable to establish firm fixed prices at the time of contract negotiation but the contracting parties are reasonably certain that firm fixed prices can be negotiated prior to the performance of 60 percent of the contract on a cost incurred basis.

(iii) *Limitations.* This clause should be used only when (*a*) the initial negotiated price is a reasonable estimate sufficient to establish a billing price; (*b*) there is sufficient time of contract performance to accomplish the price redetermination prior to completion of 60 percent of the contract on a cost incurred basis, and (*c*) the estimated value of the procurement is in excess of $100,000. A price ceiling shall be established for this type of contract in accordance with the policy set forth in paragraph (c) of this section.

(4) *Retroactive and prospective price redetermination including further prospective redetermination on request*—(i) *Description.* This clause provides all the features and is subject to the same repricing limitations of the clause described in subparagraph (3) of this paragraph with the additional provision for limited further prospective price redetermination upon written demand by either contractual party. Such further price redetermination is applicable only to supplies or services furnished after the effective date as specified in the request or the date of receipt of the request which ever is later. This clause also provides a limitation on the frequency of these additional requests.

(ii) *Applicability.* This clause is appropriate for use when it is impracticable to establish firm fixed prices at the time of contract negotiation, but when the contracting parties are reasonably certain that fair and reasonable firm fixed prices can be negotiated for the entire contract prior to the performance of 60 percent of the contract on a cost incurred basis.

(iii) *Limitations.* Subject to the same limitations contained in subparagraph (3) (iii) of this paragraph this clause should be used only when subsequent prospective price redeterminations may occur no more frequently than every 6 months after the initial price redetermination. Under this type of contract a price ceiling shall be provided for the period covered by the initial (i. e., retroactive and prospective) repricing action. After the initial repricing action the use of a price ceiling is optional. Any price ceiling shall be in accordance with the policy set forth in paragraph (c) of this section.

(5) *Retroactive price redetermination after completion*—(i) *Description.* This clause provides for a ceiling price and retroactive price redetermination after completion of the contract.

(ii) *Applicability.* This clause is designed for use in contracts where, but for special or unusual circumstances, a cost reimbursement type contract would normally be used. This clause should ordinarily be used only where the amount involved is relatively small or the time for performance is relatively short and then only after negotiation of an initial price as fair and reasonable as circumstances of the particular procurement will then permit.

(iii) *Limitation.* This clause shall only be used upon the written approval of (*a*) Office of the Deputy Chief of Staff for Logistics or Offices of Heads of the Technical Services, for the Army; (*b*) Office of Naval Material, for the Navy; and (*c*) Headquarters, Air Materiel Command, for the Air Force. The criteria for the use and submitting of requests for approval within each re-

spective Department shall be the responsibility of the aforementioned offices. A price ceiling shall be established for this type of contract in accordance with the policy set forth in paragraph (c) of this section.

(6) *Modified retroactive and prospective price redetermination for follow-on contracts*—(i) *Description.* This clause provides for gearing price redetermination under a follow-on contract to repricing under a preceding contract where both contracts together cover continuing production of similar supplies.

(ii) *Applicability.* This clause is suitable in the case of a follow-on contract which is otherwise suitable for retroactive and prospective price redetermination (with or without further optional prospective price redeterminations) where contract performance is to overlap performance of a preceding contract. It may be used where the preceding contract provides for (*a*) retroactive and prospective price redetermination at a stated time prior to completion, (*b*) retroactive and prospective price redetermination including further price redetermination on request, (*c*) retroactive price redetermination after completion, or (*d*) fixed-price incentive price revision.

(iii) *Limitation.* This clause shall be used only if the follow-on contract meets the criteria of subparagraph (3) or (4) of this paragraph.

(c) *Ceiling price provision.* (1) Ceiling prices should be established at levels which provide reasonable risk assumption by the contractor. The ceiling to individual contract after giving con be used should be determined for each sideration to such factors as the state of the art of the item being contracted for and the ability or inability to estimate accurately the labor or material costs involved in performance.

(2) Ceiling prices may be subject to adjustment by reason of the operation of other contract clauses. (See § 3.403.)

§ 3.403–4 Fixed-price incentive contracts.

(a) *Description*—(1) *General.* The fixed-price incentive contract is a fixed-price type contract with provision for adjustment of total target profit and establishment of the final contract price by a formula based on the relationship which final negotiated total cost bears to total target cost.

(2) *Initial target.* Under this type of incentive contract there is negotiated at the outset a target cost, a target profit, a price ceiling and a final profit and price adjustment formula. The formula may also provide, within the price ceiling, for a ceiling, a floor, or both on final profit. The formula should reflect the risks involved. After performance of the contract, the final cost is negotiated and the final contract price is then established in accordance with the formula. Where the final cost is less than the target cost, the formula provides for a final profit above the target profit; conversely, where the final cost is more than the target cost, the formula provides for a final profit below the target profit. Thus, the formula provides for sharing cost savings or, within the price ceiling, excesses, as revealed by a comparison of final cost with target cost. The increase or decrease in the actual profit included in the final price is thus designed to provide in advance a calculable incentive to the contractor for efficiency in performance.

(3) *Successive targets.* Under this type of incentive contract there is negotiated at the outset an initial target cost, an initial target profit, a price ceiling, a formula for fixing the firm target profit, and a production point at which the formula will be applied. Generally, the production point will be prior to delivery or shop completion of the first item. This formula does not apply to the life of the contract but simply fixes the firm target profit for the contract. The formula for fixing the firm target profit may also provide for a ceiling and floor on the firm target profit, but not one without the other. When the production point for applying the formula is reached, the firm target cost is then negotiated, giving consideration to experienced cost and all other pertinent factors, and the firm target profit is automatically determined in accordance with the formula which then passes out of existence. At this point, two alternatives are possible. First, if the remaining performance of the contract provides opportunity for application of an incentive arrangement for additional and substantial reductions in cost, a final profit and price adjustment formula may be negotiated, using the firm target profit and the firm target cost. As in the initial target type of contract described in (a) (2) above, the final cost is negotiated at the completion of the contract and the final contract price is then established in accordance with the final profit and price adjustment formula. Second, if the firm target cost plus the firm target profit present a price which is reasonable and provides normal business risks to the contractor for the performance of the contract, the price may be established as a firm fixed price.

(4) *Billing price.* In either of the above types of contract, a billing price will be established as an interim basis for payment. This billing price may be adjusted within the ceiling limits, upon request of either party to the contract, when it becomes apparent that final negotiated costs will be substantially different from the target cost.

(b) *Applicability.* (1) The initial target type of incentive contract, described in paragraph (a) (2) of this section, is appropriate for use where targets which are reasonably free of contingencies and which provide a fair and reasonable incentive can be established at the outset.

(2) The successive targets type of incentive contract, described in paragraph (a) (3) of this section, is appropriate for use where the contractor's and the Government's knowledge of probable cost of performance, though substantial, is so indefinite that fair, firm targets cannot be established at the outset, but will become sufficiently definite at an early point in the performance of the contract to permit negotiation of targets which are reasonably free of contingencies and which provide a fair and reasonable incentive.

(3) Neither type of incentive contract should be used unless there is a sufficiently long period of performance to permit achievement of substantial cost reductions.

(c) *Limitations.* Fixed-price incentive contracts shall not be used unless the contractor's accounting system is adequate for price revision purposes and permits satisfactory application of the profit and price adjustment formulas. In no case should such contracts be used where (i) reliable cost estimates are not available at the time of initial contract negotiation or at a very early point in performance, or (ii) the sole or principal purpose is to shift substantially all of the risk of performance to the Government. In no case shall the firm target profit or the final profit and price adjustment formula be established prior to the establishment of the firm target cost. Neither type of incentive contract shall be used unless a determination has been made, in accordance with the requirements of Subpart C of this part, that—

(1) Such method of contracting is likely to be less costly than other methods, or

(2) It is impractical to secure supplies or services of the kind or quality required without the use of such type of contract. The successive targets type of contract, described in paragraph (a) (3) of this section, shall be used only after written approval by (i) Office of the Deputy Chief of Staff for Logistics or Offices of Heads of the Technical Services, for the Army, (ii) Office of Naval Material, for the Navy, and (iii) Headquarters, Air Material Command, for the Air Force.

§ 3.404 Cost-reimbursement type contract.

(a) *Description.* The cost-reimbursement type of contract provides for payment to the contractor of allowable costs incurred in the performance of the contract, to the extent prescribed in the contract. This type of contract establishes an estimate of total cost for the purpose of (i) obligation of funds, and (ii) establishing a ceiling which the contractor may not exceed (except at his own risk) without prior approval or subsequent ratification of the contracting officer. A cost-reimbursement type contract may, to the extent authorized by Subpart G of this part, provide for negotiated fixed overhead rates.

(b) *Applicability.* The cost-reimbursement type contract is suitable for use when the nature and complexity of the procurement is such that costs of performance cannot be estimated with reasonable accuracy. In addition, it is essential that (1) the contractor's cost accounting system is adequate for the determination of costs applicable to the contract and (2) appropriate surveillance by Government personnel during performance will give reasonable assurance that inefficient or wasteful methods are not being used. While cost-reimbursement contracts are particularly useful for procurements involving substantial amounts, i. e., estimated cost of $25,000 or more, the Contracting Officer may determine in a given case to

utilize this type of contract to cover transactions in which the estimated costs are less than $25,000.

(c) *Limitations.* The cost-reimbursement type contract may be used only after a determination, in accordance with the requirements of Subpart C of this part, that:

(1) Such method of contracting is likely to be less costly than other methods, or

(2) It is impractical to secure supplies or services of the kind or quality required without the use of such type of contract.

§ 3.404–1 Cost contract.

(a) *Description.* The cost contract is a cost-reimbursement type contract under which the contractor receives no fee.

(b) *Applicability.* The following are illustrative situations in which the use of this type of contract may be appropriate.

(1) Research and development work particularly with nonprofit educational institutions or other nonprofit organizations.

(2) Facilities contracts.

(3) Initial small quantity procurements of new items with anticipated subsequent large production runs.

§ 3.404–2 Cost-sharing contract.

(a) *Description.* A cost-sharing contract is a cost-reimbursement type contract under which the contractor receives no fee but is reimbursed only for an agreed portion of its allowable costs.

(b) *Applicability.* A cost-sharing contract is suitable for use for those procurements which cover production or research projects which are jointly sponsored by the Government and the contractor with benefit to the contractor in lieu of full monetary reimbursement of costs. In consideration of this benefit, the contractor agrees to absorb a portion of the costs of performance. The following are illustrative situations in which this type of contract is generally desirable.

(1) Jointly sponsored research and development work with nonprofit educational institutions or other nonprofit organizations.

(2) Other research and development work where the results of the contract may have commercial benefit to the contractor.

§ 3.404–3 Cost-plus-a-fixed-fee contract.

(a) *Description.* The cost-plus-a-fixed-fee contract is a cost reimbursement type of contract which provides for the payment of a fixed fee to the contractor. The fixed fee once negotiated does not vary with actual cost, but may be adjusted as a result of any subsequent changes in the work or services to be performed under the contract.

(b) *Applicability.* The cost-plus-a-fixed-fee contract is suitable for use when a cost-reimbursement type of contract is appropriate, as provided in § 3.404 (b), and when the parties agree that the procurement should be profit bearing in the form of a fixed fee. The following are illustrative situations in which this type of contract may be appropriate:

(1) Research and development work where the scope and nature thereof cannot be definitely specified.

(2) Definite specifications exist but the contractor lacks a valid basis for estimating costs because the supplies called for are not items regularly manufactured, or the services called for have not been previously performed, or partial experience will not reveal a proper pricing level for the remainder of the production.

(3) Production or construction contracts where the specifications are not complete or where major changes substantially affecting the scope of the work are expected.

(4) Work to be performed in a Government-owned plant with the use of Government-owned facilities.

(c) *Limitations.* 10 U. S. C. 2306 (d) provides that in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the Secretary of the Department concerned at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's cost and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the Secretary of the Department concerned at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility projects). The Head of a procuring activity in the Departments of the Army and Navy and the Director of Procurement and Production of a Major Command in the Department of the Air Force or their duly authorized representatives are authorized to approve fixed fees not in excess of (1) ten per centum (10) of the estimated costs, exclusive of fee, of any contract for experimental, developmental, or research work or (2) seven per centum (7) of the estimated cost, exclusive of fee, of any other contract except that in contracts for architectural or engineering services the fixed fee shall not exceed that authorized by the terms of the law as set forth above. In appropriate cases, fees above the prescribed limits in the authorizations granted herein but within the limitations of the law may be authorized by the Secretary of the Department concerned or his designees.

(d) *Contractors' investment in work-in-process.* (1) It is the policy of the Department of Defense that contractors having cost-reimbursement type contracts should maintain a reasonable investment in the supplies and facilities acquired and in the services rendered in the performance of such contracts. This investment provides a strong incentive for the contractor to strive for greater efficiency and economy and better management, with resultant lower costs to the Government.

(2) In keeping with this policy, cost-reimbursement type contracts other than those set forth below shall provide for interim payment of not to exceed 80 percent of the costs incurred by the contractor in the performance of the contract:

(i) Contracts under which the contractors receive no fee or profit;

(ii) Contracts with educational institutions or nonprofit organizations;

(iii) Contracts solely for the operation of Government-owned plants or vessels;

(iv) Contracts with small business concerns;

(v) Contracts for research and development which do not provide for quantity production;

(vi) Contracts for performance outside the United States, its Territories, its possessions, and Puerto Rico;

(vii) Contracts having an estimated cost not in excess of $250,000;

(viii) Contracts for construction and architect-engineer services;

(ix) Contracts for scientific, technical, or engineering services (including systems design and testing and evaluation services);

(x) Contracts calling for maintenance, repair, and overhaul services in which the normal or anticipated time between the furnishing of items by the Government to the contractors for performance of the services and the delivery of the items to the Government after performance is less than three months; or

(xi) As determined by the Secretary concerned, contracts in which the application of the policy set forth in (1) above would impose undue hardship on the contractor or adversely affect the interests of the Government.

The appropriate one of the clauses set forth in § 7.203–4 shall be inserted in all cost-reimbursement type supply contracts. In all other cost-reimbursement type contracts to which the policy set forth in this § 3.404–3(d) applies, insert the clause set forth in § 7.203–4 (a) or (b), appropriately modified.

§ 3.404–4 Cost-plus-incentive-fee contract.

(a) *Description.* The cost-plus-incentive-fee contract is a cost-reimbursement-type contract with provision for a fee which is adjusted by formula in accordance with the relationship which total allowable costs bear to target costs. Under this type of contract, there is negotiated initially a target cost, a target fee, a minimum and maximum fee, and a fee adjustment formula. After performance of the contract, the fee payable to the contractor is determined in accordance with the formula. The formula provides, within limits, for increases in fee above target fee when total allowable costs are less than target costs, and decreases in fee below target fee when total allowable costs exceed target costs. The provision for increase or decrease in the fee is designed as an incentive to the contractor to increase the efficiency of performance.

(b) *Applicability.* The cost-plus-incentive-fee contract is suitable for use where a cost-reimbursement-type of contract is found necessary and where there is a probability that its use will result in lower costs to the Government than other forms of cost-reimburse-

ment-type contracts through cost reduction incentive to the contractor.

(c) *Limitation.* The target and the maximum fee shall be subject to the administrative limitations stated in paragraph (c) of § 3.404–3.

(d) *Contractors' investment in work-in-process.* See § 3.404–3 (d).

§ 3.405 Other types of contracts.

§ 3.405–1 Time and materials contract.

(a) *Description.* The time and materials type of contract provides for the procurement of supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates (which rates include direct and indirect labor, overhead, and profit) and (2) material at cost. Material handling costs may be included in the charge for "material at cost," to the extent they are clearly excluded from any factor of the charge computed against direct labor hours. This type of contract may establish either a price ceiling, or a ceiling amount which the contractor may not exceed (except at his own risk).

(b) *Applicability.* The time and materials contract is used only in those situations where it is not possible at the time of placing the contract to estimate the extent or duration of the work or to anticipate costs with any substantial accuracy. Particular care should be exercised in the use of this type of contract since its nature does not encourage efficiency. Thus it is essential that this type of contract be used only where provision is made for adequate controls, including appropriate surveillance by Government personnel during performance, to give reasonable assurance that inefficient or wasteful methods are not being used. This type of contract may be used in the procurement of (1) engineering and design services in connection with the production of supplies; (2) the engineering, design and manufacture of dies, jigs, fixtures, gauges, and special machine tools; (3) repair, maintenance or overhaul work, and (4) work to be performed in emergency situations.

(c) *Limitation.* This type of contract may be used only after determination that no other type of contract will suitably serve.

§ 3.405–2 Labor-hour contract.

(a) *Description.* The labor-hour type of contract is a variant of the time and materials type contract differing only in that materials are not involved in the contract or are not supplied by the contractor.

(b) *Applicability.* The labor-hour type of contract is applicable in those procurements described for the time and materials type contract, but in situations in which contractor-furnished materials are not involved.

(c) *Limitations.* This type of contract may be used only after determination that no other type of contract will suitably serve.

§ 3.405–3 Letter contract.

(a) *Description.* A letter contract is a written preliminary contractual instrument which authorizes immediate commencement of manufacture of supplies, or performance of services, including, but not limited to, preproduction planning and the procurement of necessary materials.

(b) *Applicability.* A letter contract may be entered into when (1) the interests of national defense demand that the contractor be given a binding commitment so that work can be commenced immediately, and (2) negotiation of a definitive contract in sufficient time to meet the procurement need is not possible, as, for example, when the nature of the work involved prevents the preparation of definitive requirements, specifications, or cost data.

(c) *Limitations.* (1) A letter contract shall be used only after a determination in accordance with Departmental procedures that no other type of contract is suitable.

(2) A letter contract shall not be entered into without competition when competition is practicable.

(3) A letter contract shall be superseded by a definitive contract at the earliest practicable date. This date shall be prior to:

(i) the expiration of 180 days from the date of the letter contract; or

(ii) 40 percent of the production of the supplies, or the performance of the work, called for under the contract; whichever occurs first. In extreme cases, an additional period may be authorized in accordance with Departmental procedures.

(4) The maximum liability of the Government stated in the letter contract generally shall not exceed 50 percent of the total estimated cost of the procurement, but this liability may be increased in accordance with Departmental procedures.

(d) *Content.* Letter contracts shall be specifically negotiated and shall, as a minimum requirement, include agreement as to the following:

(1) That the contractor will proceed immediately with performance of the contract, including procurement of necessary materials;

(2) The extent and method of payments in the event of termination either for the convenience of the Government or for default;

(3) That the contractor is not authorized to expend moneys or incur obligations in excess of the maximum liability of the Government as stated in the letter contract;

(4) The type of definitive contract;

(5) As many definitive contract provisions as possible;

(6) That the contractor shall provide such price and cost information as may reasonably be required by the Contracting Officer;

(7) That the contractor and the Government shall promptly enter into negotiations in good faith to reach agreement upon and execute a definitive contract.

§ 3.405–4 Basic agreement.

(a) *Description.* A basic agreement is a written instrument of understanding executed between a Department or procuring activity and a contractor which sets forth the negotiated contract clauses which shall be applicable to future procurements entered into between the parties during the term of the basic agreement. The use of the basic agreement contemplates the coverage of a particular procurement by the execution of a formal contractual document which will provide for the scope of the work, price, delivery, and additional matters peculiar to the requirements of the specific procurement involved, and shall incorporate by reference or append the contract clauses agreed upon in the basic agreement, as required or applicable.

(b) *Applicability.* (1) Basic agreements are appropriate for use when (i) past experience and future plans indicate that a substantial number of separate contracts may be entered into with a contractor during the term of the basic agreement, and (ii) substantial recurring negotiating problems exist with a particular contractor.

(2) *Amendment or supersession.* A basic agreement shall be amended only by an amendment of the basic agreement itself and shall not be modified or superseded by individual contracts or purchase orders entered into under and subject to the terms of such basic agreement. To minimize amendments, revisions to this subchapter involving changes in authorized contract clauses utilized in basic agreements will provide appropriate direction with respect to any required amendments of basic agreements and to the extent possible, amendments will be required only in matters resulting from changes in statutes, or executive orders. As a minimum, basic agreements will be reviewed annually on the anniversary of their effective date and revised at that time to conform with the current requirements of this subchapter. Amendments shall not have retroactive effect.

(3) *Discontinuance of basic agreement.* Basic agreements shall provide for discontinuance of their future application upon 30 days written notice by either party. Discontinuance of basic agreement will not affect any individual contract referencing the basic agreement (or the clauses appended thereto) entered into prior to the effective date of discontinuance.

(c) *Limitations.* (1) Basic agreements shall neither cite appropriations to be charged nor be used alone for the purpose of obligating funds.

(2) Basic agreements shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved. Basic agreements shall not be used in any manner to restrict competition.

(3) Basic agreements shall be utilized only in connection with negotiated contracts.

§ 3.405–5 Indefinite delivery type contracts.

One of the following indefinite delivery type contracts may be used for procurements where the exact time of delivery is not known at time of contracting.

(a) *Definite quantity contracts*—(1) *Description.* This type of contract provides for a definite quantity of specified supplies or for the performance of speci-

fied services for a fixed period, with deliveries or performance at designated locations upon order. Depending on the situation, the contract may provide for: (i) Firm fixed-prices, (ii) price escalation, or (iii) price redetermination.

(2) *Applicability.* This type of contract is particularly suitable for use where it is known in advance that a definite quantity of supplies or services will be required during a specific period and are regularly available or will be available after a short lead time. Advantages of this type of contract are that it permits stocks in storage depots to be maintained at minimum levels and permits direct shipment to the user.

(b) *Requirements contract*—(1) *Description.* This type of contract provides for filling all actual purchase requirements of specific supplies or services of designated activities during a specified contract period with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. Depending on the situation, the contract may provide for: (i) Firm fixed-prices, (ii) price escalation, or (iii) price redetermination. An estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption, or by other means. Care should be used in writing and administering this type of contract to avoid imposition of an impossible burden on the contractor. Therefore, the contract shall state, where feasible, the maximum limit of the contractor's obligation to deliver and, in such event, shall also contain appropriate provision limiting the Government's obligation to order. When large individual orders or orders from more than one activity are anticipated, the contract may specify the maximum quantities which may be ordered under each individual order or during a specified period of time. Similarly, when small orders are anticipated, the contract may specify the minimum quantities to be ordered.

(2) *Applicability.* A requirements contract may be used for procurements where it is impossible to determine in advance the precise quantities of the supplies or services that will be needed by designated activities during a definite period of time. Advantages of this type of contract are:

(i) Flexibility with respect to both quantities and delivery scheduling;

(ii) Supplies or services need be ordered only after actual needs have materialized;

(iii) Where production lead time is involved, deliveries may be made more promptly because the contractor is usually willing to maintain limited stocks in view of the Government's commitment;

(iv) Price advantages or savings may be realized through combining several anticipated requirements into one quantity procurement; and

(v) It permits stocks to be maintained at minimum levels and allows direct shipment to the user.

Generally, the requirements contract is appropriate for use when the item or service is commercial or modified commercial in type and when a recurring need is anticipated.

(c) *Indefinite quantity contract*—(1) *Description.* This type of contract provides for the furnishing of an indefinite quantity, within stated limits, of specific supplies or services, during a specified contract period, with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. Depending on the situation, the contract may provide for: (i) Firm fixed-prices; (ii) price escalation, or (iii) price redetermination. The contract shall provide that during the contract period the Government shall order a stated minimum quantity of the supplies or services and that the contractor shall furnish such stated minimum and, if and as ordered, any additional quantities not exceeding a stated maximum which should be as realistic as possible. The maximum may be obtained from the records of previous requirements and consumption, or by other means. When large individual orders or orders from more than one activity are anticipated, the contract may specify the maximum quantities which may be ordered under each individual order or during a specified period of time. Similarly, when small orders are anticipated, the contract may specify the minimum quantities to be ordered.

(2) *Applicability.* An indefinite quantity contract may be used where it is impossible to determine in advance the precise quantities of the supplies or services that will be needed by designated activities during a definite period of time and it is not advisable for the Government to commit itself for more than a minimum quantity. Advantages of this type of contract are:

(i) Flexibility with respect to both quantities and delivery scheduling;

(ii) Supplies or services need be ordered only after actual needs have materialized;

(iii) The obligation of the Government is limited; and

(iv) It permits stocks to be maintained at minimum levels and allows direct shipment to the user.

The indefinite quantity contract should be used only when the item or service is commercial or modified commercial in type and when a recurring need is anticipated.

§ 3.406 Additional incentives.

§ 3.406–1 General.

In addition to the incentive features inherent in many of the contract types, and combinations thereof, described in §§ 3.403 through 3.405, there are other means of increasing incentives to contractors, which are described below.

§ 3.406–2 Performance-incentive contracts.

(a) *Description.* A performance-incentive contract is a contract which incorporates an incentive to the contractor to surpass stated targets by providing for increases in the fee or profit to the extent that such targets are surpassed and for decreases to the extent that such targets are not met. Salient features and considerations in the use of this type of contract are as follows:

(1) "Performance," as used in this § 3.406–2, refers not only to the performance of the article being procured, but to the performance of the contractor as well. It includes timeliness of delivery, capability and serviceability of the product, ease and simplicity of operation, economy of maintenance, etc. Performance which is the minimum which the Government will accept shall be mandatory under the terms of the contract and shall receive the minimum profit or fee. Performance which meets the stated targets will warrant the "target" profit or fee. Performance which surpasses these targets will be rewarded by additional profit or fee. The incentive feature (providing for increases or decreases, as appropriate) is applied to performance targets rather than performance requirements.

(2) The incentive feature (when applied to the product) should relate to specific performance characteristics, such as, speed of an aircraft or ship, thrust of an engine, maneuverability of a vehicle, fuel economy, etc. However, higher overall performance of the end item is the primary objective of such contracts. Accordingly, the incentive feature should reflect a balancing of the various characteristics which together account for overall performance, so that no one characteristic will be exaggerated to the detriment of the end item as a whole.

(3) Since performance tests are essential in order to determine the degree of attainment of performance targets, the contract must be as specific as possible in establishing test criteria; such as, conditions of testing, precision of instrumentation, and interpretation of test data.

(4) It is essential that there be explicit agreement between the Government and the contractor as to the effect on performance of contract changes (e.g., pursuant to the Changes clause).

(5) Care must be exercised, in establishing performance criteria, to give recognition to the fact that the contractor should not be rewarded or penalized for attainments of Government-furnished components.

(6) In establishing incentives in connection with delivery schedules, it is important to determine the Government's primary objectives in a given contract. In some instances, earliest possible delivery is of paramount importance. In others, early quantity production is essential. On the other hand, it may be that maintaining an established delivery schedule is all that is desired, and that a bettering of such schedule may disrupt continuity of production or run counter to funding limitations.

(b) *Applicability.* The performance-incentive contract is suitable for use in procurements where it is desired to provide the contractor with an incentive in the form of financial reward for surpassing stated performance targets, counterbalanced by a penalty in the form of decreased profit or fee for failure to

achieve such targets. Such targets may be established as delivery schedules, performance of the end item, or, in the case of research and development contracts, as milestones of accomplishment. This type of contract is perhaps most suitable for use in procurements of major weapon systems wherein there are either substantial development goals or potentialities for improved performance which are of great importance to the Government. This type of contract poses complex problems in contract administration and should be used only after thorough evaluation of all the factors involved in each case by the contracting officer in conjunction with personnel fully qualified in contract pricing.

(c) *Limitations.* (1) Since the performance-incentive feature may result in increased costs, this feature should generally be used with fixed-price incentive (§ 3.403–4) or cost-plus-incentive-fee provisions (§ 3.404–4).

(2) In the case of contracts involving a fee, the maximum fee shall be subject to the administrative limitations stated in § 3.404–3(c).

(3) The performance-incentive contract shall be used only upon the written approval of (i) Office of the Deputy Chief of Staff for Logistics, for the Army; (ii) Office of Naval Material, for the Navy; and (iii) Headquarters, Air Materiel Command, for the Air Force. Submission of requests for approval shall be in accordance with Departmental procedures.

§ 3.406–3 Contracts with value engineering incentives.

(a) *Description.* Value engineering incentive provisions may either require or encourage the contractor to maintain a staff devoting time and effort to "value engineering studies" to reduce costs under the contract in return for which the contractor receives a stated percentage of the resulting savings. A "value engineering study" is an intensive appraisal of all the elements of the design, manufacture or construction, procurement, inspection, installation, and maintenance of an item and its components, including the applicable specifications and operational requirements, in order to achieve the necessary performance, maintainability, and reliability of the item at minimum cost. The purpose of value engineering is to make certain that every element of cost (e.g., labor, material, supplies, styling, and services) contributes proportionately to the function of the item. The Government shall make reasonable efforts to expedite the analysis of each study submitted by the contractor. Where a change recommended by a study is adopted, a change order is issued under the Changes clause, together with a reduction in the contract price corresponding to the agreed percentage of the cost reduction. The Government does not have to adopt any study and failure to do so is not subject to the Disputes clause of the contract.

(b) *Applicability.* Value engineering incentive provisions are suitable primarily where the items being procured are covered by firm Government specifications.

(c) *Limitations.* Value engineering incentive provisions shall be used only upon the written approval of the Head of a Procuring Activity.

Subpart E—[Reserved]

Subpart F—Small Purchases

§ 3.600 Scope of Subpart.

This subpart deals with the purchase of supplies and services (other than personal) when the aggregate amount involved in any one transaction does not exceed $2,500. Such purchases shall be termed "small purchases." This subpart is not applicable to supplies or services required to be procured in accordance with Part 5 of this subchapter (except as specifically provided therein), nor to any procurement initially estimated to exceed $2,500 even though awards under such procurements do not exceed $2,500.

§ 3.601 Purpose.

The objective of the simplified purchase methods prescribed in this subpart is to reduce the administrative costs in accomplishing small purchases and to eliminate costly and time-consuming paper processes. This objective can be accomplished only by effective application of these simplified purchase methods at operating levels and through continued study of small purchase practices at all procurement levels.

§ 3.602 Policy.

(a) All small purchases shall be accomplished by negotiation.

(b) Any one of the purchase methods set forth in this subpart, which is determined to be most suitable to the immediate requirement and which will accomplish the procurement in the most efficient and economical manner shall be utilized.

(c) In arriving at the aggregate amount involved in any one transaction, there must be included all supplies and services which would properly be grouped together in a single transaction, and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising. Requirements aggregating more than $2,500 shall not be broken down into several purchases which are less than $2,500 merely for the purpose of permitting negotiation or utilizing the small purchase methods authorized under this subpart.

(d) In soliciting quotations, related items (such as small hardware items, spare parts for vehicles, or office supplies, etc.) may be included on one purchase order and the lowest aggregate quotation rather than the lowest quotation on each item may be accepted. Suppliers shall be advised of this award procedure when quotations are requested.

§ 3.603 Competition.

Reasonable solicitation of quotations from qualified sources of supply shall be secured in order to assure that the procurement is made to the advantage of the Government, price and other factors considered, including the administrative cost of the purchase. Generally, solicitation shall be limited to three suppliers or the number of suppliers in the local trade area, whichever is less. Where the prices are considered to be reasonable, small purchases not exceeding $250 may be accomplished without securing competitive quotations, but such purchases shall be distributed equitably over a period of time among qualified suppliers. Reasonableness of proposed prices may be established by comparison with previous purchases, current price lists, catalogues, advertisements, or by any other appropriate method. Solicitation of quotations will generally be effected orally. Written solicitation should be used only in such circumstances as where (a) the suppliers are located outside the local area, (b) special specifications are involved, (c) a large number of items are included in a single proposed procurement, or (d) obtaining oral quotations is not considered economical. Notifications to unsuccessful suppliers is not required.

§ 3.604 Imprest funds (petty cash) method.

Imprest funds are funds not exceeding $5,000 advanced by a disbursing officer to a duly authorized agent for the "spot-cash" or c.o.d. payment for small quantities of supplies or services (other than personal).

§ 3.604–1 Conditions for use.

Imprest funds shall be used in accomplishing small purchases whenever all of the following conditions are present:

(a) The transaction is not in excess of $100;

(b) The supplies or services are immediately available, with cash payment to be made immediately upon pickup or delivery, whether at the supplier's place of business or at destination;

(c) The purchase does not require detailed technical specifications or technical inspection; and

(d) The use of imprest funds is administratively more economical and efficient than other small purchase methods.

§ 3.604–2 Documentation.

Except as hereinafter provided, no purchase order shall be issued where cash payment is to be made from imprest funds. However, all such purchases shall be supported either (a) by a sales document of the vendor, such as an original bill, sales slip, cash register ticket, or invoice, or (b) by Standard Form 1165 (Receipt for Cash-Subvoucher), or equivalent authorized form, any of which shall itemize the supplies or services purchased and the amount paid, and must be signed by the vendor or his agent so as to acknowledge receipt of payment. Where the purchase amount is less than $3 and it is impossible to secure a sales document of the vendor, the Government employee making the purchase shall execute a Standard Form 1165 (or equivalent authorized form). In those instances where a purchase document is required by the vendor to obtain Government discounts or tax exemption or for other

purposes, any authorized appropriate form may be used and shall be endorsed "Payment to be made in cash", if the vendor is to make delivery, or "Ship c. o. d.", if shipment is by parcel post or carrier.

§ 3.604–3 Cash discounts.

When effecting cash purchases, purchasing offices shall secure cash discounts to the extent obtainable.

§ 3.604–4 Delivery of cash purchases by suppliers.

Cash purchases on a delivered basis are preferable to pickups effected by Government vehicle and personnel, unless such pickups can be made as an incident to other operations or are otherwise advantageous. Imprest Funds payments for such purchases may include the cost of c.o.d., parcel post, or other delivery charges.

§ 3.605 Order-invoice-voucher method.

Standard Form 44 (Purchase Order-Invoice-Voucher) consists of four copies, i.e., a seller's invoice, seller's copy of invoice, receiving report, and memorandum copy. The use of an additional copy is authorized when essential to operating procedures.

§ 3.605–1 Limitations on use.

Standard Form 44 is authorized for accomplishing small purchases only when all of the following conditions are satisfied:

(a) The transaction is not in excess of $2,500;

(b) The supplies or services are immediately available from the local trade area;

(c) One delivery and one payment will be made; and

(d) The use is determined to be more economical and efficient than other small purchase methods.

§ 3.605–2 Examples of use.

Examples as to the appropriate use of Standard Form 44 are as follows: (a) Over-the-counter purchases, (b) purchases made by authorized individuals while away from the purchasing office; and (c) purchases at isolated stations.

§ 3.606 Blanket purchase agreement method.

§ 3.606–1 General.

The blanket purchase agreement method provides a means—of establishing "charge accounts" with qualified sources of supply to cover anticipated small purchases, as required, of readily available items of the same general category, and obviates the need for the issuance of a multiplicity of individual purchase instruments for small quantities of supplies. To the extent practicable, blanket purchase agreements for like items should be placed concurrently with more than one supplier. Requests against such agreements shall be placed only after compliance with § 3.603.

§ 3.606–2 Establishment of blanket purchase agreement.

Blanket purchase agreements may be established by the issuance of a purchase order which shall provide that:

(a) The supplier shall furnish supplies or services, described therein in general terms, if and when requested by the contracting officer or his authorized representative during a specified period and within a stipulated aggregate amount, *Provided, however*, That no individual request shall exceed $2,500;

(b) The Government is obligated only to the extent of such requests as are actually made against the blanket purchase agreement;

(c) The supplier's established price lists and discounts shall apply to all requests issued against the blanket purchase agreement;

(d) Requests shall generally be made orally, except that informal correspondence may be used where more convenient;

(e) All delivery tickets issued by the supplier shall fully identify the blanket purchase agreement, the date the request was made, the items, the prices, and other relevant data, and be signed by the Government employee who receives the items; and

(f) The supplier shall submit an itemized invoice not less frequently than once each month, or upon expiration of the blanket purchase agreement, whichever first occurs, covering all deliveries made under the blanket purchase agreement not previously invoiced and paid for, with payment to be made on the basis of this invoice.

§ 3.606–3 Conditions for use.

Blanket purchase agreements are authorized when—

(a) There is a repetitive need for small quantities of supplies or services of closely related types, such as electrical supplies, plumbing supplies, repair parts or services, or miscellaneous items of hardware;

(b) The maximum aggregate amount of all requests to be issued against one blanket purchase agreement shall not exceed the amount, if any specified in departmental procedures and the maximum period of time covered by the blanket purchase agreement shall not exceed the period, if any, specified in departmental procedures;

(c) No individual request issued against one blanket purchase agreement shall exceed $2,500; and

(d) The use of individual purchase instruments is deemed more costly administratively to the Government.

§ 3.606–4 Fiscal control.

The contracting officer shall maintain informal records of the requests made against each blanket purchase agreement, so as to insure that the value of requests made does not exceed available funds and that the designated monetary limitations are not exceeded.

§ 3.607 Use of Department of Defense or departmental procurement forms.

This subpart does not preclude the use for small purchases of such other Department of Defense or departmental purchase order forms as are authorized by Part 16 of this subchapter. The procurement form or method to be utilized shall be such as will accomplish the small purchase in the most efficient and economical manner. Where necessary, small purchases may also be effected by the use of a negotiated (two-party) formal contract, as, for example, where the procurement is (a) classified, or (b) requires specific contract provision relating to technical inspection or test, specifications changes, Government-furnished property, insurance, patents, price adjustment, or the like.

§ 3.608 Delegation of purchase authority.

Subject to the policies and procedures set forth in this subpart, the authority to make small purchases, particularly with respect to the imprest fund and order-invoice-voucher methods, shall be delegated to using activities or stations to the maximum extent practicable. In each case, however, the scope and limitations applicable to such delegations shall be clearly defined in writing.

§ 3.609 Purchase data.

In addition to records required by departmental procedures, Contracting Officers may deem it necessary to maintain, for their own use, administrative data pertaining to purchase transactions, such as notations of bid solicitations, etc. Such records shall be held to an absolute minimum.

Subpart G—Negotiated Overhead Rates

§ 3.700 Scope of subpart.

This subpart sets forth the policy and procedure governing the negotiation of overhead rates for use in cost-reimbursement type contracts.

§ 3.701 Definitions.

§ 3.701–1 Negotiated final overhead rates.

The term negotiated final overhead rate, as used in this subpart, means a percentage or dollar factor which expresses the ratio(s) mutually agreed upon by the Government and the contractor, at the close of a regularly stated period (preferably the contractor's fiscal year), of indirect expense incurred in the period to direct labor, manufacturing cost, cost of sales, or other appropriate base of the same period. Such rate is used as a means of determining the amount of reimbursement under a contract for the applicable indirect costs.

§ 3.701–2 Provisional overhead rates.

The term provisional overhead rate, as used in this part, means a tentative overhead rate established for interim billing purposes pending a negotiation of the final overhead rate.

§ 3.701–3 Overhead (indirect costs).

The term overhead (indirect costs) as used in this part, includes, but is not limited to, the general groups of indirect expenses such as those generated in manufacturing departments, engineering departments, tooling departments, general and administrative departments and, if applicable, indirect costs accumulated by cost centers within these general groups. In the case of contractors using fund accounting systems, the

term includes, but is not limited to, the general groups of expenses such as general administration and general expense, maintenance and operation of physical plant, library expenses, and use charges for building and equipment.

§ 3.702 Purpose.

The major purposes of negotiated final overhead rates are: (a) to effect uniformity of approach in cases where more than one contract or more than one Military Department is involved; (b) to effect economy in administrative effort; and (c) to promote timely settlement of reimbursement claims.

§ 3.703 Applicability.

Negotiated final overhead rates are authorized for use primarily in cost-reimbursement type contracts for research and development with commercial organizations and nonprofit or educational institutions. They may also be used in other cost-reimbursement type contracts, after a determination is made by the contracting officer that their use is advantageous to the Government. Where it is not apparent that any one of the major purposes enumerated in § 3.702 results or will result by the use of negotiated final overhead rates, the contracting officer will provide for settlement of overhead by audit determination.

§ 3.704 Contract clauses.

§ 3.704–1 Contracts with commercial concerns.

Insert the following clause in contracts with commercial concerns where negotiated overhead rates are to be used pursuant to this subpart.

NEGOTIATED OVERHEAD RATES

(a) Notwithstanding the provisions of the clause of this contract entitled "Allowable Cost, Fixed Fee, and Payment," the allowable indirect costs under this contract shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties, as specified below.

(b) The Contractor, as soon as possible but not later than ninety (90) days after the expiration of each period specified in the Schedule, shall submit to the Contracting Officer (See Instruction No. 1, § 3.704–3) a proposed final overhead rate or rates for that period based on the Contractor's actual cost experience during that period, together with supporting cost data. Negotiation of final overhead rates by the Contractor and the Contracting Officer shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with Part 15, Subpart B, as in effect on the date of this contract.

(d) The results of each negotiation shall be set forth in an amendment to this contract, which shall specify (i) the agreed final rates, (ii) the bases to which the rates apply, (iii) the periods for which the rates apply, and (iv) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs.

(e) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated provisional rates as provided in the Schedule or at billing rates acceptable to (See Instruction No. 2, § 3.704–3), subject to appropriate adjustment when the final rates for that period are established. To prevent substantial over or under payment, the provisional or billing rates may, at the request of either party, be revised by mutual agreement, either retroactively or prospectively. Any such revision of negotiated provisional rates provided in the Schedule shall be set forth in an amendment to this contract.

(f) Any failure by the parties to agree on any final rate or rates under this clause shall be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the clause of this contract entitled "Disputes."

§ 3.704–2 Contracts with nonprofit and educational institutions.

Insert the following clause in contracts with educational and nonprofit institutions where negotiated overhead rates are to be used pursuant to this subpart.

NEGOTIATED OVERHEAD RATES

(a) Notwithstanding the provisions of the clause of this contract entitled (See Instruction No. 3 § 3.704.3), the allowable indirect costs under this contract shall be obtained by applying negotiated overhead rates to bases agreed upon by the parties, as specified below.

(b) The Contractor, as soon as possible but not later than six (6) months after the expiration of each period specified in the Schedule shall submit to the Contracting Officer (See Instruction No. 1, § 3.704–3), a proposed final overhead rate or rates for that period based on the Contractor's cost experience during that period, together with supporting cost data. Negotiation of final overhead rates by the Contractor and the Contracting Officer shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with Part 15 (See Instruction No. 4, § 3.704–3), as in effect on the date of this contract.

(d) The results of each negotiation shall be set forth in an amendment to this contract, which shall specify (i) the agreed final rates, (ii) the bases to which the rates apply, (iii) the periods for which the rates apply, and (iv) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs.

(e) Pending establishment of final overhead rates for any period, the Contractor shall be reimbursed either at negotiated provisional rates as provided in the Schedule or at billing rates acceptable to (See Instruction No. 2, § 3.704–3), subject to appropriate adjustment when the final rates for that period are established. To prevent substantial over or under payment, the provisional or billing rates may, at the request of either party, be revised by mutual agreement, either retroactively or prospectively. Any such revision of negotiated provisional rates provided in the Schedule shall be set forth in an amendment to this contract.

(f) Any failure by the parties to agree on any final rate or rates under this clause shall be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the clause of this contract entitled "Disputes."

§ 3.704–3 Instructions for completing contract clauses.

1. (a) In contracts of the Departments of the Army and Air Force insert "or his authorized representative, with a copy to the cognizant audit activity."

(b) In contracts of the Department of the Navy insert "via the cognizant audit activity and the Office of the Comptroller of the Navy (Contract Audit Division)."

2. (a) In contracts of the Departments of the Army and Air Force insert "The Contracting Officer or his authorized representative."

(b) In contracts of the Department of the Navy insert "The Office of the Comptroller of the Navy (Contract Audit Division)."

3. Insert title of the "Allowable Cost" clause used in the particular contract.

4. Insert "Part 2" or "Part 3", as appropriate.

§ 3.705 Procedure.

The procedure for use of negotiated final overhead rates generally consists of submission by the contractor of an overhead rate proposal, submission of an advisory audit report, review of the contractor's proposal and the advisory audit report, conduct of negotiation, preparation of a negotiation report or summary, and execution of contract amendments or supplemental agreements.

(a) Where only one procurement activity is concerned the proposal shall be submitted to the contracting officer or his authorized representative, with a copy to the cognizant audit activity. Where coordinated negotiations as described under § 3.706 are involved, contractors' overhead rate proposals may be submitted to the cognizant negotiating activity of the Department sponsoring the negotiation, with a copy to the cognizant audit activity.

(b) The determination as to the necessity of an advisory audit report for overhead rate negotiation purposes and the extent of the use of such report is the sole responsibility of the contracting officer. Unless advised to the contrary by the contracting officer, the cognizant audit activity shall submit an audit advisory report to the contracting officer or his authorized representative. Such report shall set forth the findings of the audit activity including the results of discussion of such findings with the contractor. The audit or accounting review will be governed by the provisions of Part 15 of this subchapter.

(c) Where there is a significant difference of opinion between the auditor and the contractor concerning the allowability of indirect costs or the acceptability of the bases used in developing the overhead rates, representatives of the audit activity and the negotiating activity will discuss the areas of disagreement prior to the negotiation conference with the contractor. As a further aid to the negotiating activity, a representative of the audit activity will, upon request, attend the negotiation conference.

(d) The negotiation conference will be conducted by the contracting officer or his authorized representative. Where coordinated negotiation is involved (§ 3.706), the sponsoring negotiating activity will be the authorized representative of those procuring activities not represented. The negotiation shall be governed by Part 15 of this subchapter and shall encompass an agreement on final overhead rates, the specific items to be treated as direct charges, and the provisional overhead rates if such rates are to be specified in the contract.

(e) At the completion of the negotiation, the contracting officer or his authorized representative shall prepare a negotiation report or summary, setting forth the rates negotiated, the reasons for variation from the audit report, if any, the period of rate applicability, the

basis for the determination of such rates and, where applicable, the provisional rates agreed upon for application in the succeeding period. Such report or summary shall be the basis for amending the affected contracts; it shall become a part of the contract file; and copies shall be distributed to any interested procurement activities and the audit activity.

(f) Supplemental agreements or contract amendments will incorporate the negotiated final overhead rates, the bases to which they apply, the period of rate applicability, and the agreement with respect to the specific items of direct charges referred to in paragraph (d) of this section.

§ 3.706 Coordination.

When more than one Military Department contemplates the use of negotiated final overhead rates with the same contractor, the service having the preponderance of cost-reimbursement type work will, generally, sponsor and conduct the negotiation. Each Department having an interest will be notified of the pending negotiation and will be invited to participate in the negotiation. If a Department does not have a representative at the negotiation, the sponsoring Department will represent the absentee Department. The results of the negotiation will be binding upon all Departments. At the completion of the negotiation, the sponsoring Department will prepare and distribute to the other Departments a Negotiation Report or Summary as provided for in § 3.705(e). Each Military Department shall thereupon amend or supplement the affected contracts in accordance with the rates and other data set forth in the negotiation report or summary.

§ 3.707 Cost-sharing rates.

Cost-sharing arrangements are frequently made wherein the cost participation by the contractor is evidenced by an agreement to accept overhead rates which are lower than the anticipated actual overhead rates. In such cases, a negotiated fixed-ceiling overhead rate may be used for application prospectively, provided that in the event overhead rates developed by the cognizant audit activity on the basis of actual allowable costs are less than the negotiated rates, the negotiated rates will be reduced. Where reductions are necessary, they will be accomplished in accordance with § 3.705. The Government will not be obligated to pay any additional amounts on account of overhead above the negotiated fixed-ceiling rates.

Subpart H—Price Negotiation Policies and Techniques

§ 3.800 Scope of subpart.

This subpart sets forth the price negotiation policies and techniques applicable to negotiated prime contracts and those subcontracts which are subject to approval or review within a Department. The principles in this subpart apply to negotiation of prices on all types of contracts and to revised prices as well as initial prices.

§ 3.801 Basic policy.

§ 3.801–1 General.

It is the policy of the Department of Defense to procure supplies and services from reasonable sources at fair and reasonable prices calculated to result in the lowest ultimate over-all cost to the Government. Sound pricing depends primarily upon the exercise of sound judgment by all personnel concerned with the procurement.

§ 3.801–2 Responsibility of Contracting Officers.

(a) Contracting officers, acting within the scope of their appointments (and in some cases acting through their authorized representatives) are the exclusive agents of their respective Departments to enter into and administer contracts on behalf of the Government in accordance with this subchapter and Departmental procedures. Each contracting officer is responsible for performing or having performed all administrative actions necessary for effective contracting. The contracting officer shall exercise reasonable care, skill and judgment and shall avail himself of all of the organizational tools (such as the advice of specialists in the fields of contracting, finance, law, contract audit, mobilization planning, engineering, traffic management and cost analysis) necessary to accomplish the purpose as, in his discretion, will best serve the interests of the Government.

(b) To the extent services of specialists are utilized in the negotiation of contracts, the contracting officer must coordinate a team of experts, requesting advice from them, evaluating their counsel, and availing himself of their skills as much as possible. The contracting officer shall obtain simultaneous coordination of the specialist efforts to the greatest practical extent. He shall not, however, transfer his own responsibilities to them. Thus, the final negotiation of price, including price redetermination and evaluation of cost estimates, remains the responsibility of the contracting officer.

§ 3.801–3 Responsibility of other personnel.

Personnel, other than the contracting officer, who determine industrial mobilization plans and type, quality, quantity, and delivery requirements for items to be purchased, can influence the degree of competition obtainable as well as have a material effect upon prices. Failure to finalize requirements in sufficient time to allow—

(a) A reasonable period for preparation of request for proposals;

(b) Preparation of quotations by offerors;

(c) Contract negotiation and preparation; and

(d) Adequate manufacturing lead time;

causes delinquency in delivery and uneconomical prices. Requirements issued on an urgent basis or with unrealistic delivery schedules should be avoided since they generally increase price or restrict desired competition. Personnel determining requirements, specifications, mobilization plans, adequacy of sources of supply, and like matters have responsibility in such areas, equal to that of the contracting officer, for timely, sound, and economical procurement.

§ 3.802 Preparation for negotiation.

§ 3.802–1 Product or service.

Knowledge of the product or service, and its use, is essential to sound pricing. Before soliciting quotations, every contracting officer should develop, where feasible, an estimate of the proper price level or value of the product or service to be purchased. Such estimates may be based on a physical inspection of the product and review of such items as drawings, specifications, job process sheets, and prior procurement data. When necessary, requirements and technical specialists should be consulted. The primary responsibility for the adequacy of specifications and for the delivery requirements must necessarily rest with requirements and technical groups. However, the contracting officer should be aware of the effect which these factors may have on prices and competition, and should, prior to award, inform requirements and technical groups of any unsatisfactory effect which their decisions have on prices or competition.

§ 3.802–2 Selection of prospective sources.

Selection of qualified sources for solicitation of proposals is basic to sound pricing. Proposals should be solicited from a sufficient number of competent potential sources to insure adequate competition. (See §§ 1.302, 1.902, 3.101, 3.104, 3.105, and 12.102 of this subchapter.) The bidders mailing lists prescribed by § 2.205 of this subchapter should be used where appropriate.

§ 3.802–3 Requests for proposals.

Requests for proposals shall contain the information necessary to enable a prospective offeror to prepare a proposal properly. The request for proposals shall be as complete as possible with respect to (a) item description or statement of work; (b) specifications; (c) Government-furnished property, if any; (d) required delivery schedule; and (e) contract clauses. If a price breakdown is required, the request for proposals shall so state. Requests for proposals, including requests for revised proposals, shall specify a date for their submission. Any extension of time granted to one prospective offeror shall be granted uniformly to all. Each request for proposals shall be issued to prospective offerors at the same time and no prospective offeror shall be given the advantage of advance knowledge that proposals are to be requested. Generally, requests for proposals shall be in writing. However, in appropriate cases, such as the procurement of perishable subsistence, proposals may be solicited orally.

§ 3.803 Type of contract.

(a) The selection of an appropriate contract type and the negotiation of prices are related and should be considered together. § 3.402 lists some of the factors for this joint consideration. The objective is to negotiate a contract type

and price that includes reasonable contractor risk and provides the contractor with the greatest incentive for efficient and economical performance. When negotiations indicate the need for using other than a firm fixed price contract, there should be compatibility between the type of contract selected and the contractor's accounting system.

(b) In the course of a procurement program, a series of contracts, or a single contract running for a lengthy term, the circumstances which make for selection of a given type of contract at the outset will frequently change so as to make a different type more appropriate during later periods. In particular, the repetitive or unduly protracted use of cost-reimbursement type or time and materials contracts is to be avoided where experience has provided a basis for firmer pricing which will promote efficient performance and will place a more reasonable degree of risk on the contractor. Thus, in the case of a time and materials contract, continuing consideration should be given to converting to another type of contract as early in the performance period as practicable.

§ 3.804 Conduct of negotiations.

§ 3.804–1 General.

Evaluation of offerors' or contractors' proposals, including price revision proposals, by all personnel concerned with the procurement, as well as subsequent negotiations with the offeror or contractor, shall be completed expeditiously. Complete agreement of the parties on all basic issues shall be the objective of the contract negotiations. Oral discussions or written communications shall be conducted with offerors to the extent necessary to resolve uncertainties relating to the purchase or the price to be paid. Basic questions should not be left for later agreement during price revisions or other supplemental proceedings. Cost and profit figures of one offeror or contractor shall not be revealed to other offerors or contractors.

§ 3.804–2 Late proposals.

(a) Written requests for proposals shall contain a provision substantially as follows:

Late proposals. The Government reserves the right to consider proposals or modifications thereof received after the date indicated for such purpose, but before award is made, should such action be in the interest of the Government.

(b) While it is important and desirable that the Government should not be precluded from gaining the benefit of late proposals, careful consideration of such situations is required to prevent excessive resolicitations and other abuses. Where failure of any proposal to arrive on time is due solely to a delay for which the offeror was not responsible, or where only one proposal is received, the contracting officer may consider the proposal without utilizing the resolicitation procedure prescribed below. Proposals, or modifications thereof, received after the latest date specified for receipt by the contracting officer should be considered if there is a probability of a significant reduction in price or cost to the Government, or technical improvement, as compared with proposals previously received. The following procedure shall apply, except that it need not be followed for small purchases:

(1) Where a late low proposal, or a late proposal otherwise worthy of consideration, is received from a qualified firm, the contracting officer shall document a recommendation that the proposal, either should or should not be considered, and send it for decision to such other authority as may be prescribed by the Department concerned.

(2) When it is determined by such other authority that it is in the best interest of the Government to consider the late proposal, the contracting officer shall, consistent with § 3.805–1(a)(2), resolicit all firms (including the late offeror) which have submitted proposals and have been determined to be capable of meeting requirements. Such resolicitation shall specify a date for submission of new or revised proposals. In appropriate cases, such as where further delay in making award will jeopardize meeting the Government's requirement, a resolicitation may provide that late proposals shall not be considered, notwithstanding the Government's reservation of a right to consider such proposals (as stated in the Late Proposals provision required by § 3.804–2(a)).

§ 3.805 Selection of offerors for negotiation and award.

§ 3.805–1 General.

(a) The normal procedure in negotiated procurements, after receipt of initial proposals, is to conduct such written or oral discussions as may be required to obtain agreements most advantageous to the Government. Negotiations shall be conducted as follows:

(1) Where a responsible offeror submits a responsive proposal which, in the contracting officer's opinion, is clearly and substantially more advantageous to the Government than any other proposal, negotiations may be conducted with that offeror only; or

(2) Where several responsible offerors submit offers which are grouped so that a moderate change in either the price or the technical proposal would make any one of the group the most advantageous offer to the Government, further negotiations should be conducted with all offerors in that group.

Whenever negotiations are conducted with more than one offeror, no indication shall be made to any offeror of a price which must be met to obtain further consideration, since such practice constitutes an auction technique which must be avoided. No information regarding the number or identity of the offerors participating in the negotiations shall be made available to the public or to anyone whose official duties do not require such knowledge. Whenever negotiations are being conducted with several offerors, while such negotiations may be conducted successively, all offerors participating in such negotiations shall be offered an equitable opportunity to submit such pricing, technical, or other revisions in their proposals as may result from the negotiations. All offerors shall be informed that after the submission of final revisions, no information will be furnished to any offeror until award has been made. Modifications of proposals received after the submission of final prices shall be considered only under the circumstances set forth in § 3.804–2(b) (relating to late proposals).

(b) There are certain circumstances where formal advertising is not possible and negotiation is necessary. In the conduct of such negotiations, where a substantial number of clearly competitive proposals have been obtained and where the contracting officer is satisfied that the most favorable proposal is fair and reasonably priced, award may be made on the basis of the initial proposals without oral or written discussion: *Provided*, That the request for proposals notifies all offerors of the possibility that award may be made without discussion of proposals received and, hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint, which the offeror can submit to the Government. In any case where there is uncertainty as to the pricing or technical aspects of any proposal, the contracting officer shall not make an award without further exploration and discussion prior to award. Also, when the proposal most advantageous to the Government involves a material departure from the stated requirements, consideration shall be given to offering the other firms which submitted proposals an opportunity to submit new proposals on a technical basis which is comparable to that of the most advantageous proposal: *Provided*, That this can be done without revealing to the other firms any information which is entitled to protection under § 3.109.

(c) Except where cost-reimbursement type contracts are to be used (see § 3.805–2), a request for proposals may provide that after receipt of initial technical proposals, such proposals will be evaluated to determine those which are acceptable to the Government or which, after discussion, can be made acceptable, and upon submission of prices thereafter, award shall be made to that offeror of an acceptable proposal who is the low responsible offeror.

(d) The procedures set forth in paragraphs (a), (b), and (c) of this section may not be applicable in appropriate cases when procuring research and development, or special services (such as architect-engineer services) or when cost-reimbursement type contracting is anticipated. Award of a contract may be properly influenced by the proposal which promises the greatest value to the Government in terms of possible performance, ultimate productibility, growth potential and other factors rather than the proposal offering the lowest price or probable cost and fixed fee.

(e) Whenever in the course of negotiation a substantial change is made in the Government's requirements (for example, increases or decreases in quantities or material changes in the delivery schedules), all offerors shall be given an equitable opportunity to submit revised proposals under the changed requirements.

§ 3.805–2 Cost-reimbursement type contracts.

In selecting the contractor for a cost-reimbursement type contract, estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (a) the lowest proposed cost, (b) the lowest proposed fee, or (c) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and regulation and appropriate to the work to be performed (see § 3.808 of this subpart). Beyond this, however, the primary consideration in determining to whom the award shall be made is: which contractor can perform the contract in a manner most advantageous to the Government.

§ 3.806 Cost profit and price relationships.

(a) Where products are sold in the open market, costs are not necessarily the controlling factor in establishing a particular seller's price. Similarly where competition may be ineffective or lacking, estimated costs plus estimated profit are not the only pricing criteria. In some cases, the price appropriately may represent only a part of the seller's cost and include no estimate for profit or fee, as in research and development projects where the contractor is willing to share part of the costs. In other cases, price may be controlled by competition as set forth in § 3.805–1(a). The objective of the contracting officer shall be to negotiate fair and reasonable prices in which due weight is given to all relevant factors, including those in §3.101.

(b) Profit or fee is only one element of price and normally represents a smaller proportion of the total price than do such other estimated elements as labor and material. While the public interest requires that excessive profits be avoided, the contracting officer should not become so preoccupied with particular elements of a contractor's estimate of cost and profits that the most important consideration, the total price itself, is distorted or diminished in its significance. Government procurement is concerned primarily with the reasonableness of the price which the Government ultimately pays, and only secondarily with the eventual cost and profit to the contractor.

§ 3.807 Pricing techniques.

§ 3.807–1 General.

Policies set forth in this subpart may be applied in a variety of ways in the evaluation of offerors' or contractors' proposals and in the negotiation of contract prices. The extent to which any particular method, or combination of methods, should be used will depend upon the judgment of the contracting officer. The following sections describe several of the principal price negotiation techniques and the circumstances under which each may be used. They are equally applicable to initial and subsequent price negotiations.

§ 3.807–2 Pricing individual contracts.

Each contract shall be priced separately and independently, and no consideration shall be given to losses or profits realized or anticipated in the performance of other contracts. This prohibition neither prevents the negotiation of fixed overhead and other rates applicable to several contracts during annual or other specific periods nor prohibits forward pricing agreements applicable to several contracts.

§ 3.807–3 Price analysis.

(a) Some form of price analysis should be made in every procurement, even when competitive proposals have been submitted. The presence of effective competition, however, may make it possible to limit considerably the degree of price analysis required. In the absence of effective price competition, the negotiating team must make a thorough analysis of contractors' proposals and must be in possession of current, complete, and correct cost or pricing data before decisions are made on contract prices. Accordingly, the contractor should be required to furnish such data promptly as it becomes available throughout the negotiation process. To assure that the negotiating team is in possession of such data, the certificate set forth in § 3.807–7 shall be obtained for each separate negotiation when the amount of the procurement action exceeds $100,000, and the price negotiated is based more on the contractor's actual or estimated cost than on effective competition, established catalog or market prices, or prices set by law or regulation. The certificate may be required when lesser amounts are involved in particular cases where the contracting officer considers that the circumstances warrant such action. The certificate shall be obtained from the prime contractor immediately prior to agreement on negotiated prices, targets, or price revisions. However, the requirement for a contractor's certificate of pricing is not to be considered a substitute for a thorough examination and analysis of the contractor's proposal by the negotiating team.

(b) One form of price analysis is the comparison of prior quotations and contracts prices with current quotations for the same or similar end items. To provide a suitable basis for comparison, appropriate allowances may have to be made for differences in such factors as specifications, quantities ordered, time for delivery, Government-furnished materials, and the general level of business and prices.

(c) Rough yardsticks may often be developed (in such terms as dollars per pound, per horsepower, or other units) to point up apparent gross inconsistencies which should be subjected to additional pricing techniques, including cost analysis. Such yardsticks should be considered as an indispensable adjunct to cost analysis, since a study of a single offeror's estimated costs in sole source situations will not indicate whether the proposed price is fair and reasonable because it affords no opportunity for comparison with other products of the same kind.

§ 3.807–4 Cost analysis.

(a) The need for cost analysis depends on the effectiveness of the methods of price analysis outlined in § 3.807–3, the amount of the proposed contract and the cost and time needed to accumulate the information necessary for analysis. When cost analysis is undertaken, the contracting officer must exercise judgment in determining the extent of the analysis. Cost analysis is desirable whenever:

(1) Effective competition has not been obtained;

(2) A valid basis for price comparison has not been established, because of the lack of definite specifications, the novelty of the product, or for other reasons;

(3) Price comparisons have revealed apparent inconsistencies which cannot be satisfactorily explained or otherwise reasonably accounted for;

(4) The prices quoted appear to be excessive on the basis of information available;

(5) The proposed contract is a significant amount and is to be awarded to a sole source;

(6) The proposed contract will probably represent a substantial percentage of the contractor's total volume of business; or

(7) A cost-reimbursement, incentive, price redeterminable, or time and material contract is negotiated.

(b) Cost analysis involves the evaluation of specific elements of cost and the effect on prices of such factors as:

(1) Allowances for contingencies;

(2) The necessity for certain costs;

(3) The reasonableness of amounts estimated for the necessary costs;

(4) The basis used for allocation of overhead costs; and

(5) The appropriateness of allocations of particular overhead costs to the proposed contract.

(c) Among the several types of cost comparisons that should be made, where the necessary data are available, are comparisons of a contractor's or offeror's current estimated costs with:

(1) Actual costs previously incurred by the contractor or offeror; and with its last prior estimate for the same or similar item or with a series of prior estimates;

(2) Current estimates from other possible sources; and

(3) Prior estimates or historical costs of other contractors manufacturing the same or similar items.

(d) Forecasting future trends in costs from historical cost experience is of primary importance in pricing. In periods of either rising or declining costs, an adequate cost analysis must include

some evaluation of the trends. Even in periods of relative price stability, trend analysis of basic labor and materials costs should be undertaken in cases involving production of recently developed, complex equipment. In some cases, probable increases in labor efficiency, and reductions in material spoilage as a contractor's work force gains in experience with such new products can be predicted statistically. Efficiency curves may be devised to predict the reduction in the spoilage rate; learning curves may be devised to evaluate reductions in labor hours. Effective use of learning curves depends on the presence of the following elements:

(1) Direct labor should represent a substantial element of the total price;

(2) The contract price should be large enough to warrant the time spent in collecting the statistical data necessary to construct valid curves;

(3) The proposed contract should cover production over a relatively long period;.

(4) A substantial body of historical labor cost data must be available; and

(5) The product must be a complex, non-standard item requiring a substantial amount of assembly labor (where relatively large amounts of automatic machinery are to be employed, or the product is a relatively standard item, learning curves may be of little value.

§ 3.807–5 Subcontracting.

(a) The amount and quality of subcontracting may be a major factor influencing price. Since a large proportion of the procurement dollar is spent by prime contractors in subcontracting for work, raw materials, parts, and components, efficient purchasing practices by a contractor will contribute heavily toward efficient and economic production. While basic responsibility rests with the prime contractor for decisions to make or buy, for selection of subcontractors, and for subcontract prices and subcontract performance, the contracting officer must have adequate knowledge of these elements and their effect on prime contract prices. Therefore, contractors' "make or buy" programs and proposed subcontracts should be reviewed in accordance with Subpart I of this Part and the information from such review should be used in negotiating prime contract prices. Even though not specifically required by Subpart I, the contracting officer should, where appropriate, elicit from the offeror or contractor information concerning:

(1) The purchasing practices of the prime contractor;

(2) The principal components to be subcontracted and the contemplated subcontractors, including (i) the degree of competition obtained, (ii) cost or price analyses or price comparisons accomplished, including current, complete and correct cost or pricing data, and (iii) the extent of subcontract supervision;

(3) The types of subcontracts; i.e., firm fixed-price or other (see § 3.401); and

(4) The estimated total extent of subcontracting, including procurement of purchased parts and materials.

In connection with subparagraph (2) (ii) of this paragraph, the contracting officer shall, in the case of subcontracts which meet the criteria of § 3.807–3(a), require the prime contractor to obtain from first-tier subcontractors a certificate as set forth in § 3.807–7, modified to reflect that it is a certification to the prime contractor rather than to the Government. The prime contractor shall be required to furnish such certificate to the contracting officer.

(b) In the review of subcontracting there should be assurance that the contractors obtain competition, if available, from qualified sources in their award of subcontracts to the extent consistent with the procurement of the required services or supplies. Contractors shall be required to undertake appropriate price analysis (see § 3.807–3) in all significant subcontract transactions, and to undertake cost analysis (see § 3.807–4) if competition is not available or does not yield reasonable subcontract prices. Where the contracting officer's consent to subcontracts is required (see § 3.903), price or cost analysis shall be required as a condition to such consent.

(c) Where subcontracts are placed on a price redetermination or fixed-price incentive basis, it is particularly important in negotiating revisions of prime contract prices that there be substantial assurance that there was initial close pricing of subcontracts. Also, contracting officers should be alert to the risk of establishing firm redetermined prime contract prices while a major subcontract is still subject to price redetermination and may eventually be redetermined at a price far lower than that ascribed to it in redetermining the prime contract price, with consequent profits to the contractor far in excess of those contemplated in the prime contract price negotiation. However, in some cases, it may be appropriate to negotiate firm prime contract prices even though the contractor has not yet established final subcontract prices, if the contracting officer can justify as reasonable the amount included for subcontracting, e.g., where fairly definite cost data on subcontract prices are available. In other cases, where certain subcontracts are subject to redetermination and available cost data on these subcontracts are highly indefinite but other circumstances require prompt negotiation of revised prime contract prices, the contract modification which evidences the revised contract prices should provide for adjustment of the total amount paid or to be paid under the contract on account of subsequent redetermination of specified subcontracts. This may be done by including in the contract modification a provision substantially as follows:

> Promptly upon the establishment of firm prices for each of the subcontracts listed below, the Contractor shall submit, in such form and detail as the Contracting Officer may reasonably require, a statement of costs incurred in the performance of such subcontract and the firm price established therefor. Thereupon, notwithstanding any other provisions of this contract as amended by this modification, the Contractor and the Contracting Officer shall negotiate an equitable adjustment in the total amount paid or to be paid under this contract to reflect such subcontract price revision. The equitable adjustment shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer.
>
> [List Subcontracts]

(d) In negotiating prime contracts where the award is not determined by price competition and in consenting to cost-plus-fee subcontracts, the contracting officer shall make every effort to insure that fees under such subcontracts never exceed—

(1) Ten percent (10%) of the estimated cost, exclusive of fee, in the case of any subcontract for experimental, developmental, or research work; or

(2) Seven percent (7%) of the estimated cost, exclusive of fee, in the case of any other subcontract;

unless the payment of higher fees is approved by the Secretary concerned or his designees. These limits should not be inserted in the prime contract because such action might tend to inflate fees customarily negotiated at lower rates.

§ 3.807–6 Sole source items.

When purchases of standard commercial or modified standard commercial items are to be made from sole source suppliers' use of the techniques of price and cost analysis may not always be possible. In such instances and consistent with the volume of procurement normally consummated with the contractor, the contractor's price lists and discount or rebate arrangements should be examined and negotiations conducted on the basis of the "best user," "most favored customer" or similar practice customarily followed by the contractor. Such price negotiations should consider the volume of business anticipated for a fixed period, such as a fiscal year, rather than the size of the individual procurement being negotiated. When a contractor whose product is required because of its proprietary character or whose technical assistance is essential declines to negotiate a profit or fee in accordance with the considerations and factors set forth in § 3.808–1 or § 3.808–2, or demands a profit or fee which the contracting officer considers to be unreasonable in relation to the supplies to be furnished or services or work to be performed, the procuring activity concerned should attempt to develop an alternate source of supply.

§ 3.807–7 Certificate of current pricing data.

Where a certificate of current cost or pricing data is required in accordance with § 3.807–3(a), it shall be in the form set forth below and shall be included in the contract file along with the memorandum of the contract negotiation.

> This is to certify, to the best of my knowledge and belief, that in the preparation of the proposal for ---------- being (to be) produced under the terms of (contract, proposal, quotation, etc.) No. ------: (i) all available actual or estimated costs or pricing data have been considered in preparing the price estimate, and made known to the Contracting Officer for his use in evaluating the estimate, and (ii) any significant changes in the above data which have occurred since the preparation of the

above proposal through the _____ of _____ (Date) _____, _____ also have been made (Month) (Year) known in the price negotiations to the Government negotiator.

Name _____
Title _____
Firm _____
Date _____

Note that 18 U.S.C. 1001 prescribes criminal penalties for making false representations to the Government.

§ 3.807–8 Unacceptable substitutes for pricing negotiations.

Contracting officers shall not rely primarily (i) on the contractor's certificate as to the reliability of current data used in negotiations where effective competition is not obtained, nor (ii) on profit limiting statutes as remedies for ineffective pricing. Such statutes generally provide for the recapture of excessive profits.

§ 3.807–9 Specified contingencies.

Where a contract is to include a provision for adjustment of price upon the happening of a specified contingency (e.g., escalation clauses, Government-furnished property clauses, tax clauses), the contract price should not include any amount on account of such contingency.

§ 3.808 Profit or fee.

§ 3.808–1 General.

A fair and reasonable provision for profit or fee cannot be made by simply applying a certain predetermined percentage to the cost estimate or selling price of a product. Rather, the profit or fee should be first established as a dollar amount, after considering the factors set forth in this section. Therefore, where a fee is involved and it is necessary to determine the percentage relationship between the fee and the estimated cost of the contract in order to comply with administrative and statutory limitations on fees for cost-reimbursement type contracts, the percentage shall be determined only after the dollar amount of the fee has been established for negotiation purposes.

§ 3.808–2 Factors for determining fee or profit.

The factors set forth in subparagraphs (a) through (i) below should be considered in determining profit or fee in all contracts, whether for supplies or services; for construction work; or for experimental, developmental, or research work; and whether of the fixed-price type or of the cost-reimbursement type unless otherwise specified in the particular factor. All of the following factors, as set forth in paragraphs (a) through (i) of this section should be evaluated in the light of the basic policy set forth in § 3.801–1 which provides that supplies and services shall be procured from responsible sources at fair and reasonable prices calculated to result in the lowest overall cost to the Government:

(a) *Effect of competition.* Where competition is adequate and effective and proposals are on a firm fixed-price basis, the contracting officer normally need not consider in detail the amount of estimated profit included in a price. Where effective competition is lacking, the estimate for profit for the proposed fixed fee should be analyzed in the same manner as all other elements of price, applying the factors set forth in this section.

(b) *Degree of risk.* (1) The degree of risk assumed by the contractor should influence the amount of profit or fee a contractor is entitled to anticipate. For example, where a portion of the risk has been shifted to the Government through cost-reimbursement or price redetermination provisions, unusual contingency provisions, or other risk-reducing measures, the amount of profit or fee should be less than where the contractor assumes all risk.

(2) Some cost-plus-a-fixed-fee contracts and task orders for research and development call for the delivery of prototypes of other "hardware." Other such contracts or task orders require only that the contractor exert its "best efforts" to deliver the required end item. Frequently this is because the contractor is not willing to assume the additional burden of incurring substantial cost overruns without additional fee in order to complete performance. When the contract calls for delivery of developed models in accordance with well-defined performance or design characteristics or a predetermined delivery schedule, or both, in contrast to an obligation only to exert its "best efforts" to develop and deliver such models, payment of the fee should be conditioned on performance in accordance with the contractor's obligation to deliver, and in such cases the contractor may be entitled to a larger fee both because of the risk inherent in its commitment and because of the successful completion of the work.

(c) *Nature of work to be performed.* A major consideration in the determination of the amount of profit or fee, particularly in connection with experimental, developmental, or research work, is the difficulty or complexity of the work to be performed and any unusual demands of the contract, such as whether the project involves a new approach unrelated to existing equipment or only refinements on existing equipment, whether the caliber or class of engineer involved is that of an "idea-man," or whether the contractor is to be required by the contract to assign to the work unusually skilled talent.

(d) *Extent of government assistance.* The Department of Defense encourages its contractors to perform their contracts with the minimum of financial, facilities, or other assistance from the Government. Where extraordinary financial, facilities, or other assistance must be furnished to a contractor by the Government, such extraordinary assistance should have a modifying effect in determining what constitutes a fair and reasonable profit or fee. (See also § 3.404–3(d).)

(e) *Extent of the contractor's investment.* The extent of a contractor's total investment (i.e., both equity and borrowed capital) in the performance of the contract will be taken into consideration in determining the amount of the fee or profit.

(f) *Character of contractor's business.* Recognition must be given to the type of business normally carried on by the contractor, the complexity of manufacturing techniques, the rate of capital turnover, and the effect of each individual procurement upon such business. For example, where a contractor is engaged in an industry where the turnover of working capital is low, generally the profit objective on individual contracts is higher than in those industries where the turnover is more rapid.

(g) *Contractor's performance.* In addition to the factors set forth in § 3.101, the contractor's past and present performance should be evaluated in such areas as quality of product, quality control, scrap and spoilage, efficiency in cost control (including need for and reasonableness of cost incurred), meeting delivery schedules, timely compliance with contractual provisions, creative ability in product development (giving consideration to commercial potential of product), engineering (including inventive, design simplification, and development contributions), management of subcontract programs, and any unusual services furnished by the contractor. Where a contractor has consistently achieved excellent results in the foregoing areas in comparison with other contractors in similar circumstances, such performance merits a proportionately greater opportunity for profit or fee. Conversely, a poor record in this regard should be reflected in determining what constitutes a fair and reasonable profit or fee.

(h) *Subcontracting.* In negotiating the profit or fee, the nature and extent of any subcontracting should be considered, particularly as it bears on the contractor's performance, administrative responsibility, financial investment, and degree of risk as outlined above. The degree and nature of subcontract programs vary on a broad spectrum. While it is not possible to define precisely the exact profit or fee treatment to be accorded each situation, the general guidelines which follow will be taken into consideration. The evaluation of a contractor's subcontracting program should not consist merely of applying arbitrary percentages of profit to subcontract prices in negotiating the prime contract price. A relatively large amount of subcontracting need not make for negotiation of a lesser profit or fee—the character and circumstances of the subcontracting and the effect on the prime contractor's costs must be taken into account. Although purchased material and subcontracted work are usually properly included in the base upon which profit is computed, instances may arise in which a significant portion or portions of a contract are subcontracted in such a way that only a minimum amount of responsibility or risk remains with the prime contractor. In such a case, the amount of fee or profit should be less than where the contractor assumes substantial risk. Of primary importance is the degree to which the subcontracting provides a better product and lower costs, with timely delivery,

and in which the contractor assumes heavy managerial effort, responsibility and risk. In this connection, consideration should be given to the contractor's past and present effectiveness in offering to qualified small business concerns and to firms in labor surplus areas an opportunity to compete for subcontracts (see for example, § 1.707–3) and to the contractor's furnishing assistance to such concerns as they require or as the Government may specifically request. A contractor's effectiveness in furnishing such opportunity or assistance to an unusual or exceptional degree, should be given favorable consideration in determining the amount of fee or profit.

(i) *Unrealistic estimates.* If records reveal that a contractor's actual costs are consistently lower than his estimated costs (indicating a practice of excessive estimates), and if the contractor refuses to provide what seems to be reasonable estimate of costs, a lower profit or fee should be considered.

§ 3.808–3 Incentive profit or fee.

See §§ 3.403–4, 3.404–4 and 3.406.

§ 3.808–4 Minimal fees or cost sharing arrangements.

In certain circumstances, as where experimental, developmental, or research work is attractive because of direct or potential commercial applications, consideration should be given to using a contract providing for only a nominal or token fee, or no fee, or on a cost-sharing basis.

§ 3.808–5 Fee limitation for experimental, developmental, or research work.

In connection with the administrative and statutory limitations on fees set forth in § 3.404–3(c), the existence of the administrative limitation of 10 percent for research and development work should not prevent the negotiation of fees, either fixed or incentive, up to the level of the statutory limitation of 15 percent in the appropriate circumstance. Such cases, however, shall be fully documented through factual support including specific details of prior experience with the contractor, the complexity of the work to be performed, and the details in connection with all of the above factors. Contractors proposing such fees should be required to support their proposals in a similar manner. These requirements apply not only to fixed fees but to incentive fees as well which in their final evaluation can exceed the administrative limitation.

§ 3.809 Audit as a pricing aid.

(a) *General.* The audit services within the Military Departments should be utilized as a pricing aid by the contracting officer to the fullest extent appropriate when the dollar amount involved is sufficiently large to, or special circumstances exist which warrant the time and expense required for the particular type of advisory audit, special survey, or audit analysis of price or cost desired. Judicious use of audit services will expedite proper pricing. The determination as to the necessity of an audit report for pricing purposes is the responsibility of the contracting officer. When requesting audit services, the contracting officer shall state the purpose for which the report is to be used and define any specific areas of audit examination which should be given special attention.

(b) *Application.* Except for contracts containing retroactive price revision clauses, pricing techniques are concerned mainly with estimates of future costs. Therefore, audit reports for either retroactive or prospective pricing should not only establish costs accrued to a specific cut-off point for price proposal purposes but also should include cost trends and other available information which would be of assistance to the contracting officer in price negotiation. Such audit reports will serve a useful purpose in:

(1) The evaluation of contingency allowances, overhead allocations, purchasing management efficiency, and similar cost elements;

(2) Both the initial and subsequent pricing of contracts containing price revision clauses;

(3) Establishing limitations on costs and price revision adjustments; and

(4) Establishing negotiated overhead rates for cost-reimbursement type contracts.

(c) *Conditions for use.* Close coordination between the audit agency and procurement personnel will assist in determining the necessity of audit of price or cost proposals or the necessity of special surveys relating to contractor's accounting or purchasing systems. Some of the conditions under which the contracting officer should consider the use of audit services include:

(1) Inadequate knowledge concerning the contractor's accounting policies, cost systems, or substantially changed methods or levels of operation;

(2) Previous unfavorable experience indicating doubtful reliability of the contractor's estimating, accounting, or purchasing methods;

(3) Procurement of a new product for which cost experience is lacking; and

(4) Contract performance requiring a substantial period of time.

§ 3.810 Exchange of information.

In appropriate cases it is desirable to exchange and coordinate specialized information regarding a contractor between Military Departments, bureaus, technicial services and other procuring activities since it will provide uniformity of treatment of major issues and it may aid in the resolution of particularly difficult or controversial issues.

§ 3.811 Record of price negotiation.

At the conclusion of each negotiation of an initial or a revised price, the contracting officer shall promptly prepare or cause to be prepared a memorandum, setting forth the principal elements of the price negotiation, for inclusion in the contract file and for the use of any reviewing authorities. The memorandum shall be in sufficient detail to reflect the most significant considerations controlling the establishment of the initial or revised price.

Subpart I—Subcontracting Policies and Procedures

§ 3.900 Scope of subpart.

This subpart sets forth policies and procedures for the evaluation, review, and approval of contractors' "make or buy" programs, purchasing systems, and proposed subcontracts.

§ 3.901 General.

(a) Information as to the contractor's "make or buy" program, purchasing system, and proposed subcontracts may be important to (1) negotiation of reasonable contract prices (see §§ 3.807–5 and 3.808–2(h)), (2) assurance of satisfactory contract performance, or (3) carrying out Government policies regarding small business (§ 1.707–1), labor surplus areas (§ 1.805–1), use of Government facilities, maintenance of mobilization base, or other policies which may be appropriate to the particular procurement. Therefore, Government review of contractors' "make or buy" programs and proposed subcontracts is required as set forth in this subpart. Where make or buy decisions and subcontracting will have a substantial impact on price negotiation or contract performance or administration, the contractor's "make or buy" program and subcontracting should be evaluated and agreed on during negotiations, to the extent practicable.

(b) Review of the contractor's purchasing system, principal proposed subcontracts and "make or buy" program should generally be made where (1) the item, system, or work is complex, the dollar value is substantial, or competition is restricted; and (2) cost reimbursement, price redetermination, or incentive-type contracts are to be used.

§ 3.902 Review of "make or buy" program.

(a) A "make or buy" program is that part of a contractor's written plan for the production of an end item which outlines the major components, assemblies, subassemblies, and parts to be manufactured (including testing, treating, and assembling) in his own facilities and those which will be obtained elsewhere by subcontract. A "make" item is any item produced, or work performed, by the contractor or his affiliate, subsidiary, or division.

(b) Where the nature of the procurement is such that, in view of the factors in § 3.901(b) above, review of the "make or buy" program is appropriate or is otherwise considered essential, the prospective contractor shall be required to submit its proposed "make or buy" program, together with sufficient data to permit the contracting officer to evaluate such factors in paragraph (c) of this section as are pertinent.

(c) In reviewing the "make or buy" program during negotiation, consideration shall be given to the following factors in the light of how they affect the interests of the Government:

(1) The effect of the contractor's plan to make or buy, as the case may be, on price, quality, delivery, and performance;

(2) Whether the contractor plans to broaden its base of subcontractors through competitive means;

(3) Whether the contractor has given consideration to competence, abilities, experience, and capacities available within other firms;

(4) Whether small business concerns are given an equitable opportunity to compete for subcontracts;

(5) Whether the contractor or major subcontractors propose to do work in plant, the nature of which differs significantly from their normal in-plant operations or for which they are not historically suited;

(6) Whether production of the item or performance of the work will create a requirement, either directly or indirectly, for additional facilities to be furnished by the Government, by the contractor, or by subcontractors;

(7) whether the contractor proposes to ask the Government to furnish additional facilities to do the work in-plant for which there is capacity elsewhere which is competitive in quality, delivery, and overall cost, and is acceptable as a source to the contractor; and

(8) Other factors, such as the nature of the item, experience with similar items, future requirements, engineering, tooling, starting load costs, market conditions, and the availability of personnel and material.

After agreement on the program is reached, the contracting officer shall notify the contractor as to the Government's approval of the program and shall inform the contractor as to any requirement for further review during performance of the contract.

(d) In contracts resulting from negotiation in which a "make or buy" review has been made and agreement reached thereon pursuant to paragraph (c) of this section, there generally should be included a requirement for notification to the Government in advance of any proposed change to the "make or buy" program together with justification therefor. Where notification is required, the following clause shall be used:

CHANGES TO MAKE OR BUY PROGRAM

The contractor agrees to perform this contract in accordance with the "make or buy" program attached to this contract except as hereinafter provided. If the Contractor desires to change the "make or buy" program, he shall notify the Contracting Officer in writing of the proposed change reasonably in advance and shall submit justification in sufficient detail to permit evaluation of the proposed change. With respect to items deferred at the time of negotiation of this contract for later additions to the "make or buy" program, the Contractor shall notify the Contracting Officer of each proposed addition at the earliest possible time, together with justification in sufficient detail to permit evaluation. The Contractor shall not, without the written consent of the Contracting Officer, make changes or additions to the programs: *Provided*, That in his discretion, the Contracting Officer may ratify in writing any changes or additions and such ratification shall constitute the consent of the Contracting Officer required by this clause. The "make or buy" program attached to this contract shall be deemed to be modified in accordance with the written consent or ratification by the Contracting Officer.

(e) Approval of the contractor's purchasing system (§ 3.903) shall not be construed as approval of the "make or buy" program where such is required.

§ 3.903 Review of subcontracting and contractors' purchasing systems.

Examination of the contractor's purchasing system and plans for subcontracting, review of proposed subcontract sources and prices in the light of the factors indicated in § 3.901, and discussions with contractor to bring about any adjustments which may be needed to clear the way for formal subcontract approval, should generally be accomplished as part of the negotiation of the prime contract. Any resulting purchasing system approvals may be granted before the contract is executed.

§ 3.903–1 Contract clauses.

(a) The prescribed clauses, covering Government consent to subcontracts, for cost-reimbursement type contracts are set out in §§ 7.203–8 and 7.402–8. Except where definite and final evaluation of the contractor's subcontracting is accomplished during negotiations, the following clause (unless modified in accordance with paragraphs (b), (c), or (d) of this section) shall be included in all fixed-price incentive and fixed-price redeterminable contracts where—

(1) It is anticipated that one or more subcontracts may each exceed $100,000 or such other figure as is to be included in (b)(ii) and (iii) of the following clause in accordance with paragraph (c) of this section;

(2) The work of the prime contractor, or of the plant or division of the prime contractor which will perform the contract, is predominantly for the Government; or

(3) The estimated contract price is $1,000,000 or more.

SUBCONTRACTS

(a) As used in this clause, the term "subcontract" includes purchase orders.

(b) Except as provided in paragraph (d) below, the Contractor shall notify the Contracting Officer reasonably in advance of entering into any subcontract which—

(i) Is on a cost-plus-a-fee, time and material, or labor-hour basis and which would involve an estimated amount in excess of $10,000, including any fee; or

(ii) Is proposed to exceed $100,000; or

(iii) Is one of a number of subcontracts under this contract with a single subcontractor for the same or related supplies or services which, in the aggregate, are expected to exceed $100,000.

(c) The advance notification required by paragraph (b) above shall include:

(i) A description of the supplies or services to be called for by the subcontract;

(ii) Identification of the proposed subcontractor and an explanation of why and how the proposed subcontractor was selected, including the degree of competition obtained;

(iii) The proposed subcontract price, together with the Contractor's cost or price analysis thereof, including current, complete, and correct cost or pricing data, accompanied by a certificate from the subcontractor, in such form as the Contracting Officer may prescribe, to the effect that all cost or pricing data has been considered by the subcontractor in preparing its proposal and that such data is current, and has been provided the Contractor; and

(iv) Identification of the type of contract proposed to be used.

(d) Advance notifications of subcontracts, as required by paragraph (b) above, are not required for any subcontract (i) not on a cost-plus-a-fee, time and material, or labor-hour basis, if the Contracting Officer has in writing approved the Contractor's purchasing system and the subcontract is within the limitations of such approval, or (ii) consented to in writing by the Contracting Officer as a proposed subcontract prior to the execution of this contract.

(e) The Contractor shall not, without the prior written consent of the Contracting Officer, enter into any subcontract for which advance notification to the Contracting Officer is required by this clause; *provided* that, in his discretion, the Contracting Officer may ratify in writing any subcontract and such ratification shall constitute the consent of the Contracting Officer required by this paragraph.

(f) No consent by the Contracting Officer to any subcontract or any provisions thereof or approval of the contractor's purchasing system shall be construed to be a determination of the acceptability of any subcontract price or of any amount paid under any subcontract or to relieve the contractor of any responsibility for performing this contract, unless such approval or consent specifically provides otherwise.

(g) The Contractor agrees that no subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis.

(b) The clause set forth in paragraph (a) of this section may be appropriately modified so as not to require advance notification of, or consent to, any subcontracts which have been definitely and finally evaluated during negotiations. In this respect, the clause may limit advance notifications thereunder to one or more particular subcontracts or classes of subcontracts, or may, in individual cases, be tailored to unusual or particular circumstances.

(c) In paragraph (b) (ii) and (iii) of the clause set forth in paragraph (a) of this section, a lower dollar amount may be inserted in lieu of $100,000 where it is determined that closer surveillance of subcontracting is desirable because of the character of the industry involved, the critical nature of work which will probably be subcontracted, the absence of competition in placing the prime contract, uncertainties as to the adequacy of the contractor's purchasing system, or the novelty of the supplies or services being procured. A higher dollar amount than $100,000 may be inserted in paragraph (b) (ii) and (iii) of the clause when the insertion of the higher amount is approved at a level higher than that of the contracting officer, as prescribed by the Department concerned.

(d) The certificate prescribed by paragraph (c)(iii) of the clause shall be in the form set forth in § 3.807–7 appropriately modified to reflect that it is a certificate to the prime contractor, rather than to the Government.

§ 3.903–2 Consent to subcontracts.

(a) The contracting officer's consent to subcontracts required by the clause set forth in § 3.903–1 (for fixed-price redeterminable or fixed-price incentive contracts) or the clause set forth in §§ 7.203–8 or 7.402–8 (for cost-reimbursement type contracts) shall be accorded by individual consent on subcontract-by-subcontract basis. However,

where the contracting officer has approved the contractor's purchasing system, in whole or in part, such consent is not required for subcontracts within the scope of such approval, except as to cost-reimbursement type, time and materials, or labor-hour subcontracts, and in the case of cost-reimbursement type prime contracts, subcontracts, which provide for the fabrication, purchase, rental, installation, or other acquisition of any item of industrial facilities.

(b) The purposes of subcontract consent requirements are usually best served if review and analysis of the contractor's purchasing system and of its proposed subcontracts are carried out in conjunction with negotiation of the prime contract and concurrently with any review of the contractor's "make or buy" program as required by § 3.902). Although consent to subcontracts cannot always be formally accomplished prior to execution of the prime contract (since definitive subcontracts are not generally entered into until after execution of the prime), the review, analysis, and discussion leading up to such formal consents should, where feasible, be conducted during the negotiation process.

§ 3.903–3 Approval of purchasing system.

(a) Approval of a contractor's purchasing system should be granted only after a survey which includes review of such factors as:

(1) The degree of competition obtained by the contractor's purchasing methods;

(2) The contractor's pricing policies and techniques, when necessary, including its methods of obtaining current, complete and accurate cost and pricing data;

(3) The contractor's method of evaluating subcontractors' responsibility (§ 1.906);

(4) The extent to which the purchasing system is consistent with any contract requirements covering small business and labor surplus area concerns; and

(5) The treatment accorded affiliates of the contractor or other concerns having close working arrangements with the contractor.

(b) Approval of a contractor's purchasing system may be unqualified or may be limited. For example, the purchasing system may be approved except for subcontracts in excess of a stated amount or except for subcontracts for stated work which is of such critical nature that extraordinary Government surveillance is called for. Where the approval is limited by reason of deficiencies in the purchasing system, the contractor shall be notified of such deficiencies and requested to correct them. In no case shall approval of the contractor's purchasing system waive the requirement for individual consent to cost-reimbursement, time and materials, or labor-hour subcontracts. In the case of cost-reimbursement type prime contracts, in addition to the foregoing, approval of the contractor's purchasing system shall not waive the requirements for individual consent to subcontracts which provide for the fabrication, purchase, rental, installation, or other acquisition of any item of industrial facilities.

(c) Upon approval of the contractor's purchasing system (whether unqualified or limited), the contracting officer shall give the contractor written notice thereof. The notice shall set forth any limitations on the approval and shall state that the approval does not (1) relieve the prime contractor of any of its obligations under any contract, (2) restrict the Government from subsequently withdrawing the approval in whole or in part, or (3) cover any unapproved material changes which the contractor may make in its purchasing system.

(d) After approval of the contractor's purchasing system, periodic examination of the contractor's operations under such system shall be made to determine whether any substantial changes in procedures, initiated by the contractor or as a result of recommendations by the Government, have occurred, as well as to evaluate the contractor's performance under the purchasing system.

(e) Prior to conduct of a survey of the contractor's purchasing system, the contracting officer or responsible activity shall ascertain in accordance with Departmental procedures whether other Department of Defense activities have conducted surveys of the purchasing system. In this connection, pertinent information relating to the most recent survey and the results thereof (including any updating accomplished) shall be requested and shall be furnished expeditiously by the activity performing such review. Maximum use will be made of the past evaluation in order to prevent needless multiplicity of surveys.

§ 3.903–4 Review of individual subcontracts.

(a) In reviewing or consenting to individual subcontracts, the contracting officer should give appropriate consideration to the following:

(1) Whether the decision to enter into the proposed subcontract is consistent with the contractor's approved "make or buy" program, if any (see § 3.902);

(2) Whether the proposed subcontract will require the use of Government furnished facilities;

(3) The responsibility of the proposed subcontractor (§ 1.906);

(4) Basis for selecting proposed subcontractor, including the degree of competition obtained;

(5) Cost or price analysis or price comparisons accomplished, with particular attention to whether cost or pricing data are current, complete, and correct (see § 3.903–1(d));

(6) Extent of subcontract supervision;

(7) Types of contracts used (Subpart D of this part); and

(8) Estimated total extent of subcontracting, including procurement of parts and materials.

(b) In reviewing subcontracts, careful and thorough evaluation is particularly necessary when:

(1) The prime contractor's purchasing system or performance thereunder are considered inadequate;

(2) Subcontracts are for items for which there is no competition or for which the proposed prices appear unreasonable (see § 3.807–5(b) of this part).

(3) Close working arrangements or business or ownership affiliations exist between the prime and the subcontractor which may preclude the free use of competition or result in higher subcontract prices than would otherwise be obtained;

(4) A subcontract is being proposed at a price less favorable than that which has been given by the subcontractor to the Government, all other factors such as manufacturing period and quantity being comparable; or

(5) A subcontract is to be placed on a cost-reimbursement, time and material, labor-hour, fixed-price incentive, or fixed-price redeterminable basis.

Where subcontracts have been placed on a cost-reimbursement, time and materials, or labor-hour basis, contracting officers should be skeptical of approving the repetitive or unduly protracted use of such types of subcontracts and should follow the principles of § 3.803(b).

§ 3.904 Additional contract clauses.

Additional contract clauses with respect to subcontracting with Small Business and Labor Surplus Area concerns are set forth in Part 7 of this subchapter.

PART 4—SPECIAL TYPES AND METHODS OF PROCUREMENT

Subpart A—[Reserved]

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—[Reserved]

Subpart E—Procurement by Barter—Commodity Credit Corporation

Sec.
4.501 General.
4.502 Procurement effected within the United States.
4.503 Procurement effected outside the United States.

AUTHORITY: §§ 4.501 to 4.503 issued under R.S. 161, sec. 2202, 70A Stat. 120; 5 U.S.C. 22, 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314.

Subpart A—[Reserved]

Subpart B—[Reserved]

Subpart C—[Reserved]

Subpart D—[Reserved]

Subpart E—Procurement by Barter—Commodity Credit Corporation

§ 4.501 General.

The purpose of this subpart is to establish procedures which will assist the Commodity Credit Corporation to arrange and to make, through private trade channels, barters and exchanges of United States surplus agricultural commodities.

§ 4.502 Procurement effected within the United States.

(a) On requirements of $100,000 or more for:

(1) Materials or equipment required in connection with foreign economic and military aid and assistance programs;

(2) Materials or equipment required for offshore construction programs; or

(3) Other supplies not subject to the Buy American Act or the limitations contained in the Annual Appropriations Act (Berry Amendment), or which have been previously excepted therefrom pursuant to Subpart F, Part 1 of this subchapter;

the purchasing office shall send a copy of the invitation for bids or request for proposals to the Commodity Credit Corporation, Barter and Stockpiling Division, U.S. Department of Agriculture, Washington 25, D.C.

(b) Such invitations for bids or requests for proposals shall contain appropriate space for indicating alternate prices, one clearly labeled for barter prices and the other clearly labeled for non-barter prices. In addition, such invitations for bids and request for proposals shall include the following clause:

NOTE—PAYMENT BY BARTER (JUN. 1957)

Attention is directed to section 303 of the Agricultural Trade Development and Assistance Act of 1954 (Pub. Law 480, 83d Cong.) which authorizes the disposal by barter or exchange of surplus agricultural commodities for use outside of the United States, its possessions and Puerto Rico. BIDDERS OR OFFERORS INTERESTED IN A BARTER ARRANGEMENT (accepting payment in agricultural commodities for use outside of the United States, its possessions, and Puerto Rico rather than in dollars) SHOULD CONSULT AND MAKE APPROPRIATE ARRANGEMENTS WITH THE COMMODITY CREDIT CORPORATION, Barter and Stockpiling Division, United States Department of Agriculture, Washington 25, D.C., prior to submitting a bid.

Simultaneously with the issuance of this invitation for bids or request for proposals, a copy thereof is being furnished to the Commodity Credit Corporation.

Bids or proposals may be made on a barter basis, or on a non-barter basis, or on both bases in the alternative. Bids or proposals on either basis shall be stated in terms of dollars, not in terms of the desired commodity. Arrangements for converting dollar receipts under the contract into commodities must be made by separate agreement with the Commodity Credit Corporation.

Any bid or proposal based on a barter arrangement must be submitted directly to the purchasing office issuing this invitation for bids or request for proposals. In addition, a copy of the official bid or proposal must be forwarded to the Commodity Credit Corporation, by the time specified for submitting bids or proposals, in a sealed envelope marked with the invitation for bids or request for proposals number, and the date and time of opening by the purchasing office.

The Commodity Credit Corporation will consider the barter aspects of all such bids or proposals and will then advise the purchasing office issuing this Invitation for Bids or Request for Proposals which bids or proposals, if any, based on a barter arrangement are acceptable to the Commodity Credit Corporation. Any such bids or proposals which are acceptable to the Commodity Credit Corporation will be considered and evaluated by the purchasing office in connection with the evaluation of the non-barter bids or proposals received hereunder. If the lowest acceptable barter type bid or proposal is equal to or less than the price of the lowest responsive non-barter bid or proposal, preference will be given to the barter type bid or proposal.

No award will be made on a barter basis unless the bidder or offeror has entered into a suitable agreement with the Commodity Credit Corporation and the Commodity Credit Corporation has informed the purchasing office that the barter bid or proposal is acceptable. If the award is made on the basis of a barter type bid or proposal, the bidder or offeror, pursuant to the clause of the contract entitled Assignment of Claims and notwithstanding any language to the contrary contained therein, hereby irrevocably assigns all the moneys due or to become due under the resultant contract to the Commodity Credit Corporation. The bidder or offeror will be entitled to acquire commodities on the basis of its agreement with the Commodity Credit Corporation.

(c) The Commodity Credit Corporation will retain the barter bids or proposals which it receives in a locked container or until at least 24 hours after the specified opening time for bids or proposals. The bids or proposals based on a barter arrangement will then be opened and analyzed by the Commodity Credit Corporation, which will advise the contracting officer as to which such bids or proposals are acceptable to the Commodity Credit Corporation.

(d) The contracting officer shall make an award on the basis of the lowest responsive bid or proposal, and shall advise the Commodity Credit Corporation in the event the award is made on the basis of a barter type bid or proposal. No award will be made until the Commodity Credit Corporation advises the procuring office as to which barter type bids or proposals, if any, are acceptable, or until ten days after the date set for the opening of bids or receipt of proposals. If the lowest acceptable bid or proposal is on a barter basis, the contracting officer, prior to making the award, shall require such bidder or offeror to furnish evidence of an agreement with the Commodity Credit Corporation covering the payment and assignment arrangements. Where no barter type bids are received by the Commodity Credit Corporation, the Commodity Credit Corporation will promptly advise the contracting officer.

(e) Where the award is made on the basis of a barter type bid or proposal, payment will be made in accordance with the terms of the contract, but to the Commodity Credit Corporation rather than directly to the contractor.

(f) Negotiated contracts based on a barter type proposal shall contain a provision reciting the irrevocable assignment of the contractor's claim for payment to the Commodity Credit Corporation.

§ 4.503 Procurement effected outside the United States.

On procurements of $100,000 or more for supplies or services, except those procurements to be funded and denominated in local currencies or funded in dollars and denominated in local currencies, major overseas commands shall utilize the procedures outlined below:

(a) Major overseas commands shall make available to designated representatives of the Commodity Credit Corporation a copy of all new contracts resulting from procurements described above.

(b) Contracting officers shall distribute to prospective contractors, with the Invitation for Bids or Request for Proposals, or during the course of negotiations, a Commodity Credit Corporation information sheet describing the procurement by barter program.

(c) Designated representatives of the Commodity Credit Corporation are authorized direct contact with contracting officers for the purpose of obtaining information with respect to pertinent clauses in specific existing contracts which may affect barter negotiations.

(d) Commodity Credit Corporation may obtain from a contractor an assignment of moneys due or to become due to the contractor and must, in accordance with the provisions of the Assignment of Claims clause, forward a Notice of Assignment of Claims to the contracting officer, to the disbursing officer, and to any sureties on the contract. The contracting officer shall insure that the Notice of Assignment of Claims is signed by an authorized representative of the Commodity Credit Corporation and that a true copy of the instrument of assign-

ment between the contractor and the Commodity Credit Corporation is attached to the notice. The contracting officer shall acknowledge receipt of the Notice of Assignment of Claims from the Commodity Credit Corporation.

(e) Upon presentation of invoices by the contractor, the contracting officer shall insure that each invoice contains a statement by the contractor that he recognizes the assignment to the Commodity Credit Corporation, its validity, and the right of the Commodity Credit Corporation to receive payment. Disbursing officers shall effect appropriate payments to the Commodity Credit Corporation for the amount of the invoice, less any authorized deductions.

PART 5—INTERDEPARTMENTAL PROCUREMENT

Sec.
5.000 Scope of part.

Subpart A—Procurement Under Federal Supply Schedule Contracts

5.100 Applicability.
5.101 Federal Supply Schedule contracts.
5.102 Distribution of Federal Supply Schedules and related publications.
5.103 Mandatory use of Federal Supply Schedules.
5.103–1 General.
5.103–2 Exceptions to mandatory use.
5.103–3 List of Federal Supply Schedule contracts which are mandatory upon the Department of Defense.
5.103–4 Establishment or revision of Federal Supply Schedules mandatory upon Department of Defense.
5.104 Federal Supply Schedules the mandatory use provisions of which do not apply to the Department of Defense.
5.105 Completely optional Federal Supply Schedules.
5.106 Federal Supply Schedules with multiple award provisions.

Subpart B—Procurement From General Services Administration Stores Depots

5.200 Applicability.
5.201 General.
5.202 Stores Stock Catalog.
5.203 Procedure for procurement from General Services Administration Stores Depots.
5.204 General Services Administration Stores Depots and regional offices.

Subpart C—Procurement Through Federal Supply Service Consolidated Purchasing Programs

5.300 Applicability.
5.301 Federal Supply Service consolidated purchasing programs.
5.302 Mandatory use of consolidated purchasing programs.
5.303 Optional use of consolidated purchasing programs.

Subpart D—Procurement of Prison-Made Supplies

5.400 Applicability.
5.401 General.
5.402 Preference as between prison-made and blind-made supplies.
5.403 Schedule of supplies which are prison-made.
5.404 Mandatory procurement of prison-made supplies.
5.404–1 Mandatory procurement from Federal Prison Industries, Inc.
5.404–2 Mandatory procurement of prison-made supplies from General Services Administration Stores Depots.
5.405 Nonmandatory procurement of prison-made supplies.
5.406 Procurement procedure.
5.406–1 Procurement from Federal Prison Industries, Inc.
5.406–2 Procurement from General Services Administration Stores Depots.
5.407 Exceptions.
5.408 Clearances.

Subpart E—Procurement of Blind-Made Supplies

5.500 Applicability.
5.501 General.
5.502 Schedule of supplies which are blind-made.
5.503 Mandatory procurement of blind-made supplies.
5.504 Procurement procedure.
5.504–1 From General Services Administration Stores Depots.
5.504–2 Through National Industries for the Blind.
5.505 Clearances.
5.505–1 Emergency requirements.
5.505–2 Supplies not available from agencies for the blind.
5.506 Optional procurement of blind-made supplies.

Subpart F—Procurement of Printing and Related Supplies

5.601 Printing and related supplies.

Subpart G—Procurement Under the Economy Act From or Through Another Federal Agency

5.700 Scope of subpart.
5.701 Authorization and policy relating to placing and filling orders.
5.702 Determination of amount and method of payment.

Subpart H—Procurement of Certain Utility Services by Use of General Services Administration Area Contracts

5.800 Applicability.
5.801 General.
5.802 Distribution of GSA Public Utility Schedules and related publications.
5.803 Department of Defense use of GSA area contracts.
5.804 Ordering under area contracts.

Subpart I Through J—[Reserved]

Subpart K—Coordinated Procurement

5.1100 Definitions.
5.1100–1 Coordinated procurement.
5.1100–2 Single procurement.
5.1100–3 Requiring department.
5.1100–4 Procuring department.
5.1100–5 Military interdepartmental purchase request (MIPR).
5.1101 Application of procurement assignment.
5.1102 Responsibilities under single procurement.

Sec.

5.1102-1 Single department procurement.
5.1102-2 Joint procurement.
5.1102-3 Plant Cognizance Procurement.
5.1103 General principles governing implementation of procurement assignments.
5.1103-1 Standard format—development and promulgation of implementing procedures.
5.1103-2 Relationship between research and development and single procurement.
5.1103-3 Small dollar value purchases.
5.1103-4 Emergency.
5.1103-5 Department of Defense Manufacturing Establishment.
5.1103-6 Local purchase as normal means of supply.
5.1104 Items in short supply.
5.1105 Transfer of uncompleted contracts.
5.1105-1 Effect of assignment of procurement responsibility.
5.1105-2 Disputes under transferred contracts.
5.1105-3 Contracting officers under transferred contracts.
5.1106 Purchase authorization.
5.1106-1 MIPR's or other authorized procurement requests.
5.1106-2 Determinations and findings.
5.1107 Components of end items.
5.1107-1 Contractor-furnished components.
5.1107-2 Government-furnished components.
5.1107-3 Purchase of components over and above those initially purchased with the end item.
5.1108 Funds and payments.
5.1108-1 Citation of appropriation and funds of Requiring Department.
5.1108-2 Citation of funds of Procuring Department.
5.1109 [Reserved]
5.1110 Administrative costs.
5.1111 Inspection.
5.1112 Execution and administration of contracts.
5.1113 Status reporting.
5.1114 Specifications.
5.1115 Transportation of supplies.
5.1116 Procurement agreements.

Subpart L—Commodity Assignments

5.1201 Commodity assignments to Military Departments.
5.1201-1 Department of the Army.
5.1201-2 Department of the Navy.
5.1201-3 Department of the Air Force.

AUTHORITY: §§ 5.000 to 5.1201-3 issued under R.S. 161, sec. 2202, 70A Stat. 120; 5 U.S.C. 22, 10 U.S.C. 2202. Interpret or apply secs. 2301-2324, 70A Stat. 127-133; 10 U.S.C. 2301-2314.

§ 5.000 Scope of part.

This part deals with the procurement of supplies and services by the Military Departments from or through any other Government department or agency, with the exception of the procurement of supplies and services under the authority of Part 4, Coordinated Procurement. This subpart is not applicable to procurement effected outside the United States except as otherwise provided by Departmental procedures.

Subpart A—Procurement Under Federal Supply Schedule Contracts

§ 5.100 Applicability.

This subpart applies only to procurements of supplies to be delivered, or services to be performed, in the United States, its Territories, possessions, or Puerto Rico, as indicated in the Federal Supply Schedule check list current at the time of the procurement.

§ 5.101 Federal Supply Schedule contracts.

The Federal Supply Service, General Services Administration, enters into open end contracts for many classes of supplies and services which, although in common use by Federal agencies, normally do not lend themselves to definite quantity consolidated buying or to distribution from GSA warehouse stock. Federal Supply Schedules are General Services Administration publications which list under commodity classifications the supplies or services to be purchased from the contractors named therein. Military purchasing activities are required (see § 5.103) or authorized (see §§ 5.104 and 5.105) to order supplies and services under Federal Supply Schedule contracts. The ordering of such supplies and services under Federal Supply Schedule contracts shall be effected by placing delivery orders on DD Form 1155 (Order for Supplies or Services) (see § 16.303) in accordance with the provisions of the applicable Federal Supply Schedule and §§ 5.103, 5.104, and 5.105, or, when agreed to by the contractor, by one of the methods set forth in §§ 3.604, 3.605, or 3.606 of this chapter.

§ 5.102 Distribution of Federal Supply Schedules and related publications.

To obtain copies of Federal Supply Schedules, contractors' catalogs (including price lists) except those catalogs which by special agreement may be furnished directly by contractors, and Federal Supply Schedule check lists, purchasing activities and installations shall process requests on GSA Form 457 to the General Services Administration regional office serving the area in which the purchasing activity or installation is located. The check lists are issued periodically to show the status of all Federal Supply Schedules in effect, amendments thereto as to the dates specified, and information as to other pertinent matters. Purchasing activities and installations shall also request from the GSA regional office distribution of copies of general provisions for Federal Supply Schedule contracts. The General Services Administration regional or district offices are listed in § 5.204.

§ 5.103 Mandatory use of Federal Supply Schedules.

§ 5.103-1 General.

Section 5.103-3 lists the classes of supplies and services, the procurement of which under Federal Supply Schedules is mandatory on the Department of Defense. These Federal Supply Schedule contracts provide that for a definite period the contractor is obligated to deliver all supplies and services that may be ordered thereunder by Government agencies, subject to stated minimum and maximum amounts of any order (see paragraph (b) of § 5.103-2).

§ 5.103-2 Exceptions to mandatory use.

(a) *Emergency procurement.* When an emergency requires immediate delivery of supplies or services designated as mandatory on the Department of Defense which cannot be effected by ordering under Federal Supply Schedule contracts, authority is granted to make open market procurements of such supplies and services after the contracting officer has determined in writing that an emergency exists.

(b) *Abnormal requirements.* Federal Supply Schedule contracts generally provide that the mandatory use of provisions do not apply to abnormal requirements; that is, (1) any order of less than a stated minimum amount, (2) any order for an item or combination of items in excess of a stated maximum amount, and (3) a series of orders from the same ordering office in quick succession and aggregating in excess of the maximum amount.

(c) *Similar items.* Where specific articles or services listed in a mandatory Federal Supply Schedule will not meet a special requirement, open-market purchase of articles or services to meet such a special requirement is authorized. When articles or services having the same general characteristics and intended use are so procured, a written statement, citing the articles or services together with the reasons why items listed in the applicable Federal Supply Schedule would not serve the purpose, shall be prepared, signed by an authorized official of the using agency, and furnished the General Services Administration office which issued the Schedule within 15 days after date of purchase.

§ 5.103-3 List of Federal Supply Schedule contracts which are mandatory upon the Department of Defense.

(a) *Mandatory nationally.*

Class	*Title of schedule*
7, 14	Gasoline and Lubricating Oil—Service Station Deliveries.
8	Tires and Tubes (Other Than Aircraft), Part II (Commercial tires and tubes only).
8, 45, 60	Brake Lining, Clutch Facings, Oil Filter Elements, and Tire Chains, Etc., Part IV. (Selected items only are mandatory upon DOD.)
17	Spark Plugs, Part II.
17	Electric Lamps, Part VI.
17	Household and Quarters Lamps, Part VII.
18	Purchase, Maintenance, Repair, and Rental of Micro-Photographic Equipment, and Supplies, Part IV.
26	Household and Quarters Furniture, Part I.
26	Household and Quarters Furniture, Part II.
26	Household and Quarters Furniture, Part III.
26	Household and Quarters Furniture, Part IV.
26	Office Furniture, Wood and Steel, Including Steel Insulated Filing Cabinets, Part V.
27	Floor Coverings, Part I.
35	Books, Part I, Sections A and B. (Section A only is mandatory upon DOD.)
35	Periodicals and Law Books, Part II. (Law Books Section only is mandatory upon DOD.)

Class	Title of schedule
53	Drafting-Room and Office Supplies, Part I.
53	Envelopes, Printed and Plain, Part V.
54, 104	Typewriters (Manual and Electric); Purchase, Exchange Allowances, and Repair Parts; Maintenance and Reconditioning of Electric Typewriters, Part I.
54	Office Equipment, Part III, Sections A and B.
54	Offset Duplicating Blankets and Plates, Direct Image and Photographic (Metal and Paper Type), Part IV.
66	Vacuum Cleaners and Repair Parts, Accessories and Attachments, Part II.
83	Aircraft Tires (Casings and tubes).
103	Recordings and Transcription Service, Part I.

(b) *Mandatory in Washington, D. C., and contiguous area.*

Class	Title of schedule
16, 17	Dry Batteries.
18, 51, 53	Photographic Paper and Film, and Other Sensitized Materials and Photographic Chemicals, Classes 18 and 51, Part II, and Class 53, Part III. (Class 51 and 53 items only are mandatory upon DOD.)
26	Executive Type Furniture, Class 26, Part VI. Also Class 25, Smoking Stands, Class 53, Desk Trays, and Class 54, Baskets, Wastepaper.
27	Window Coverings, Part III.
42	Abrasives, Casters, Door Closers, Padlocks, Steel Strapping, etc.
51	Gases, Industrial, Medicinal, and Refrigeration; Part III.
53	Rubber Stamps, Part IV.
57	Laboratories and Special Apparatus and Supplies, Section C.
58	Fire Extinguishers, Repair Parts, and Accessories.
67	Feed and Forage, Part I.
67	Seed, Part II.
70	Agricultural Materials (Fertilizers, peat, and soil conditioners).
89 [1]	Subsistence Items.
89 [1]	Ice.
103	Correct Time Service.
103	Regraining of Offset Duplicating Plates, Part II.
103	Wiping Cloth Service, Part IV.

[1] FSC group.

§ 5.103–4 Establishment or revision of Federal Supply Schedules mandatory upon Department of Defense.

(a) *Policy.* The Administrator of General Services has agreed that the concurrence of the Office of the Secretary of Defense will be obtained prior to establishing a Federal Supply Schedule which is mandatory upon the Department of Defense or prior to adding or removing any items from Federal Supply Schedules which are mandatory upon the Department of Defense or making any other changes in such schedules affecting their use by Department of Defense in meeting its supply requirements. However, deletion of an item from a Federal Supply Schedule will not require Office of the Secretary of Defense concurrence when the reports of sales for that item amount to less than $1,000 per year except where—

(1) The item is a part or accessory incidental to a basic item;

(2) The item is a component of a unit assembly;

(3) The item has a demonstrated need to fill out a range of colors, sizes or other characteristics; or

(4) The item involves a contract for services.

(b) *Procedures.* Requests for the establishment of or a change in a Federal Supply Schedule mandatory on elements of the Department of Defense shall be forwarded through channels to the Office of the Assistant Secretary of Defense (Supply and Logistics). Such proposals normally shall be forwarded in sufficient time to provide three months for consideration by all interested elements of the Department of Defense and General Services Administration prior to the desired effective date. In the event action on such proposals is desired in a shorter period of time, a minimum of thiry-five days for consideration should be anticipated. These proposals will be distributed to the representatives of the Military Departments and General Services Administration engaged in the Federal Supply Schedule review program, as appropriate, for comment or concurrence. Any questions will be jointly considered before final action is taken. If the Department of Defense and General Services Administration representatives cannot reach agreement on a question raised regarding proposals involving Federal Supply Schedules mandatory upon the Department of Defense, the question will be forwarded to the Assistant Secretary of Defense (Supply and Logistics) for consideration, and, if appropriate, for a statement of the Department of Defense position to the Administrator of General Services.

§ 5.104 Federal Supply Schedules the mandatory use provisions of which do not apply to the Department of Defense.

In addition to the Federal Supply Schedule contracts listed in § 5.103, there are other Schedules containing mandatory use provisions which do not apply to the Department of Defense and under which the Federal Supply Schedule contractors are not required to accept orders from the Military Departments. However, such Federal Supply Schedule contracts may be considered as available sources of supply against which military purchasing activities may place orders on an optional basis. Such schedules shall not be used for the procurement of nonmandatory items when (a) changes in specifications are anticipated, (b) technical inspection is required, or (c) special packaging, packing, preservation, or marking is necessary. When an order of $2,500 or more is contemplated from such schedules the purchasing activity shall assure itself prior to ordering that the order is reasonably justifiable, based on considerations such as time of delivery, service, and administrative expense, as being more advantageous to the Government than a purchase from other sources.

§ 5.105 Completely optional Federal Supply Schedules.

In addition to the Federal Supply Schedule contracts described in §§ 5.103 and 5.104 there are Federal Supply Schedules in the following areas which are completely optional; Government purchasing activities are not required to order under such contracts and the contractors are not required to accept orders:

Class	Title
8–10–60–66	Motor-Vehicle Parts and Accessories; Gasoline and Diesel Engine Parts, and Construction and Road-Building Machinery Parts.
54	Rental, Repair, Maintenance, and Reconditioning of Office Machines.

Military purchasing activities may place orders under such schedules subject to the limitations and procedures prescribed in § 5.104.

§ 5.106 Federal Supply Schedules with multiple award provisions.

There are also multiple award Federal Supply Schedules which list several contractors as possible sources for certain requirements. When orders in excess of $2,500 are placed at other than the lowest price available for the type of services or supplies required, the purchasing activity shall include in the contract file a memorandum for record setting forth the facts and conclusions justifying the order. The justification may be based on considerations such as time of delivery, service, and administrative expense. Where the Federal Supply Schedule indicates that the multiple awards were made in order to make available a selection of services or supplies to meet a specific requirement, the justification may, in addition to the considerations stated above, be based on differences in performance characteristics, and compatibility with existing equipment or systems.

Subpart B—Procurement From General Services Administration Stores Depots

§ 5.200 Applicability.

This subpart applies only to procurements of supplies to be delivered in the United States, its Territories, its possessions, or Puerto Rico, as indicated in the General Services Administration Stores Stock Catalog current at the time of the procurement.

§ 5.201 General.

It is the general policy of the Department of Defense, when consistent with military necessity, to place maximum re-

liance on producer or commercial distributive systems for supplying requirements of the military departments. However, items and classes of material which have been designated for supply through local purchase and which normally are stocked by General Services Administration Stores Depots will be procured through the appropriate General Services Administration Stores Depot: *Provided*, That—

(a) The delivered price from the General Services Administration Stores Depot is not greater than the delivered price of the item from commercial sources;

(b) The service rendered by the General Services Administration Stores Depot, in terms of availability and procurement lead time, is equal to or better than that of commercial sources; and

(c) Such procurement is consistent with Subparts D and E of this part. The procurement of items stocked by General Services Administration Stores Depots which are under DOD–GSA interagency purchase assignments will be in accordance with the implementing procedures relating to such assignments.

§ 5.202 Stores Stock Catalog.

The General Services Administration periodically publishes an illustrated "Stores Stock Catalog" which sets forth, among other things (a) all standard supplies carried in stock for issue by the Stores Depots listed in § 5.204, (b) special supplies carried in stock for issue only by certain of the depots, and (c) price information on a portion of the supplies listed. Copies of the "Stores Stock Catalog," and additional price lists may be obtained, upon request, from any of the regional offices or depots listed in § 5.204.

§ 5.203 Procedure for procurement from General Services Administration Stores Depots.

Procurement from General Services Administration Stores Depots of supplies listed in the "Stores Stock Catalog" shall be made by submitting a delivery order on DD Form 1155 (Order for Supplies or Services), (see § 16.303 of this subchapter) to that General Services Administration Stores Depot which can best serve the procuring activity or installation, taking into consideration transportation costs, shipping time, and the regional boundaries of the Stores Depots. The delivery order shall contain the information required by the ordering instructions in the catalog.

§ 5.204 General Services Administration Stores Depots and regional offices.

The General Services Administration operates stores depots and regional offices located in or near the cities listed below, serving the areas indicated on the back cover page of the "Stores Stock Catalog." The addresses shown are the mailing addresses to which all orders and correspondence should be forwarded.

GSA Region	*Address*
1. Boston, Mass	620 Post Office and Court House Building, Boston 9, Mass.
2. New York, N. Y	250 Hudson Street, New York 13, N. Y.
3. Washington, D. C	Room 5450, Seventh and D Streets SW., Washington 25, D. C.
4. Atlanta, Ga	Peachtree-Seventh Building, 50 Seventh Street NE., Atlanta 23, Ga.
5. Chicago, Ill	7200 South Leamington Avenue, Chicago 38, Ill.
Cleveland, Ohio	Room 212, Federal Building, Public Square, Cleveland 14, Ohio.
6. Kansas City, Mo	2306 East Bannister Road, Kansas City, Mo.
7. Dallas, Tex	P. O. Box 1315, Fort Worth, Tex.
8. Denver, Colo	Denver Federal Center, Denver, Colo.
9. San Francisco, Calif	49 Fourth Street, San Francisco 3, Calif.
Los Angeles, Calif	Orders for shipment by this depot should be directed to the San Francisco address.
10. Seattle, Wash	C/o Naval Air Station, Seattle 15, Wash.

Subpart C—Procurement Through Federal Supply Service Consolidated Purchasing Programs

§ 5.300 Applicability.

This subpart is not applicable to the procurement of supplies and services outside the United States.

§ 5.301 Federal Supply Service consolidated purchasing programs.

The Federal Supply Service conducts consolidated purchasing programs for the delivery of definite quantities of selected supplies directly from vendors to depots of various Government agencies for storage and subsequent issue, or for delivery to use points or transshipping points for oversea use. In this connection, purchase responsibility for certain common administrative supplies or services, as it affects the Department of Defense, is assigned in accordance with § 1.112 of this subchapter.

§ 5.302 Mandatory use of consolidated purchasing programs.

Mandatory use by the Departments of the consolidated purchasing programs of the Federal Supply Service, covering selected common administrative supplies and services, will be prescribed by Department of Defense Directives. Requirements of the Military Departments, to the extent practicable, shall be determined and furnished sufficiently in advance to the Federal Supply Service in order that planned procurement may be accomplished.

§ 5.303 Optional use of consolidated purchasing programs.

Optional use by the Military Departments of consolidated purchasing programs conducted by the Federal Supply Service is permitted for common administrative supplies and services which are not covered by the mandatory purchasing programs required by Department of Defense directives.

Subpart D—Procurement of Prison-Made Supplies

§ 5.400 Applicability.

This subpart is not applicable to supplies both procured and used outside the United States.

§ 5.401 General.

Supplies of the classes listed in the "Schedule of Products Made in Federal Penal and Correctional Institutions" shall be purchased in accordance with the policies and procedures set forth in this subpart.

§ 5.402 Preference as between prison-made and blind-made supplies.

In any case where similar supplies are manufactured or offered for sale both by Federal penal and correctional institutions and by agencies for the blind, the supplies must be purchased from Federal Prison Industries, Inc., to the extent available.

§ 5.403 Schedule of supplies which are prison-made.

Supplies which are manufactured by Federal penal and correctional institutions are in strict conformity with Federal Specifications. These supplies are listed in the "Schedule of Products Made in Federal Penal and Correctional Institutions" (referred to in this subpart as the "Schedule"). Copies of the Schedule are available from Federal Prison Industries, Inc., care of Department of Justice, Washington 25, D.C.

§ 5.404 Mandatory procurement of prison-made supplies.

§ 5.404–1 Mandatory procurement from Federal Prison Industries, Inc.

Supplies listed in the Schedule shall be procured directly from Federal Prison Industries, Inc., when—

(a) Supplies require oversea packaging or packing;

(b) Supplies are required in carload lots, as described in the Consolidated Freight Classification for the commodity concerned; or

(c) Supplies are required in less than carload lots, but are not stocked by General Services Administration Stores Depots.

§ 5.404–2 Mandatory procurement of prison-made supplies from General Services Administration Stores Depots.

Supplies listed in the Schedule which are required in less than carload lots and which are stocked by General Services Administration Stores Depots shall be procured from such Depots, except that procurement shall be made directly from Federal Prison Industries, Inc., when (a) the procuring activity or installation is so located that it is more practical and economical to procure directly from Federal Prison Industries, Inc., rather than from or through the General Services Administration, or (b) the General Services Administration Stores Depot is temporarily unable to furnish the required supplies, in which instance the Depot will so advise the procuring activity or installation so that the procurement may be made directly from Federal Prison Industries, Inc.

§ 5.405 Nonmandatory procurement of prison-made supplies.

Contracting Officers are encouraged to utilize the facilities of Federal Prison Industries, Inc., to the maximum extent practicable in the procurement of supplies which are not listed in the Schedule, but which are nevertheless of a type manufactured in Federal penal and correctional institutions.

§ 5.406 Procurement procedure.

§ 5.406–1 Procurement from Federal Prison Industries, Inc.

Procurement directly from Federal Prison Industries, Inc., will be made by placing a delivery order, using DD Form 1155 (Order for Supplies or Services), (see § 16.303 of this subchapter) with Federal Prison Industries, Inc., c/o Department of Justice, Washington 25, D.C.

§ 5.406–2 Procurement from General Services Administration Stores Depots.

Procurement from General Services Administration Stores Depots of prison-made supplies listed in the Schedule shall be made by submitting a delivery order, using DD Form 1155 (see § 16.303 of this subchapter), to the General Services Administration Regional Office which normally serves the procuring activity or installation.

§ 5.407 Exceptions.

Supplies listed in the Schedule may be procured through National Industries for the Blind or from commercial sources without securing clearance from Federal Prison Industries, Inc., under any of the following conditions:

(a) Immediate delivery or performance is required by public exigency;

(b) Suitable used supplies can be obtained;

(c) Supplies are both procured and used outside the United States and Alaska; or

(d) The total cost of the order is $25 or less.

§ 5.408 Clearances.

In addition to the exceptions provided in § 5.407, the Military Departments may procure through National Industries for the Blind or from commercial sources, supplies of the types listed in the Schedule to the extent only that such procurement is specifically authorized in clearances issued by Federal Prison Industries, Inc., as set forth in paragraphs (a) and (b) of this section:

(a) General clearances are issued by Federal Prison Industries, Inc., when classes of supplies are not available from Federal penal and correctional institutions, or when it is otherwise in the best interest of the Government to allow procurement of those classes of supplies from agencies for the blind or from commercial sources. A copy of each general clearance is forwarded to the Department of Defense for dissemination to the Military Departments. Purchase orders or contracts written pursuant to a general clearance need not be supported by a copy of the clearance, but the clearance number must be cited on the purchase order or contract as well as on the initial voucher.

(b) Formal clearances are issued in response to requests initiated by procuring activities or installations desiring to procure from agencies for the blind or from commercial sources supplies of the type listed in the Schedule when such supplies are not covered by a general clearance. Requests for formal clearances shall be addressed to Federal Prison Industries, Inc., % Department of Justice, Washington 25, D. C. Actual purchase of the required supplies shall not be consummated prior to the issuance of the formal clearance. A copy of the clearance certificate must be attached to the initial voucher.

Subpart E—Procurement of Blind-Made Supplies

§ 5.500 Applicability.

This subpart is not applicable to supplies both procured and used outside the United States.

§ 5.501 General.

Supplies listed in the Schedule of Blind-Made Products shall be procured in accordance with the policies and procedures set forth in this subpart.

§ 5.502 Schedule of supplies which are blind-made.

Supplies manufactured by agencies for the blind are listed in the Schedule of Blind-Made Products (referred to in this Subpart E as the Schedule), now printed in separate loose-leaf form, copies of which may be obtained from any of the General Services Administration Regional Offices or Depots listed in § 5.204. Items available from stocks at General Services Administration Stores Depots are so identified in the Schedule.

§ 5.503 Mandatory procurement of blind-made supplies.

(a) Except as provided in § 5.402, supplies listed in the Schedule shall be procured from agencies for the blind. Orders for such supplies shall be submitted to the General Services Administration Stores Depot which can best serve the procuring activity or installation, except that when one of the conditions set forth below is present, procurement shall be through the National Industries for the Blind:

(1) Supplies require overseas packaging or packing;

(2) Supplies are required in carload lots, as described in the Consolidated Freight Classification for the commodity concerned;

(3) Supplies are stocked by General Services Administration Stores Depots, but the procuring activity or installation is so located that it is more practical and economical to purchase directly from the agency for the blind which manufactures the supplies, rather than from the stores depot; or

(4) The schedule indicates that the supplies are not stocked by General Services Administration Stores Depots.

(b) Supplies listed in the Schedule may be procured from commercial sources under any of the conditions set forth below without securing clearance:

(1) military necessity requires delivery within two weeks;

(2) the procurement is less than a single unit as listed in the Schedule or is for $25 or less; or

(3) supplies are both procured and used outside the United States and Alaska.

§ 5.504 Procurement procedure.

§ 5.504–1 From General Services Administration Stores Depots.

When procurement of blind-made supplies is to be effected from a General Services Administration Stores Depot, such procurement shall be made by submitting a delivery order on DD Form 1155 (see § 16.303 of this subchapter) to the General Services Administration Stores Depot which can best serve the procuring activity or installation.

§ 5.504–2 Through National Industries for the Blind.

When procurement of blind-made supplies is to be effected through the National Industries for the Blind, such procurement shall be made by submitting directly to the National Industries for the Blind, 15 West 16th Street, New York 11, New York, a request, in letter form, for an allocation. Upon receipt of the request, requirements will be allocated by the National Industries for the Blind, and the procuring activity will be notified of the name and location of the agency designated to manufacture the requirements. Upon receipt of such notification, a delivery order (DD Form 1155) shall be issued to the designated agency for the blind. Such orders may be issued without limitation as to dollar amount and shall be recorded as obligations upon issuance.

§ 5.505 Clearances.

In addition to the exceptions listed in § 5.503(b) the Military Departments may procure from commercial sources, supplies of the types listed in the Schedule only to the extent that such procurement is specifically authorized in clearances issued by National Industries for the Blind or General Services Administration as provided below.

§ 5.505–1 Emergency requirements.

In an emergency when the required delivery date is in excess of two weeks, procurement of supplies of the classes listed in the Schedule may be made from a commercial source: *Provided, however,* That a clearance shall be obtained, prior to the purchase, from the General Services Administration regional office which normally serves the procuring activity or installation.

§ 5.505–2 Supplies not available from agencies for the blind.

When a request for supplies is submitted to National Industries for the Blind and notification is received that none of the agencies for the blind can furnish the supplies within the period specified, an open-market purchase of the items listed in such notification may be effected: *Provided,* That purchase action is instituted within 30 days from the date of notification.

§ 5.506 Optional procurement of blind-made supplies.

Supplies of any type or classification may be procured from agencies for the blind in any quantity, including less than carload lots, when such agency is the low bidder or offeror in response to an invitation for bids or request for proposals.

Subpart F—Procurement of Printing and Related Supplies

§ 5.601 Printing and related supplies.

Printing, binding, and blank-book work, and envelopes, paper, and related supplies, shall be procured in accordance and with (a) regulations of the Congressional Joint Committee on Printing, and (b) procedures prescribed by each respective Department.

Subpart G—Procurement Under the Economy Act From or Through Another Federal Agency

§ 5.700 Scope of subpart.

This subpart deals with orders for supplies or services placed with another Government department or agency pursuant to the authority of the Economy Act of June 30, 1932, as amended (31 U.S. Code 686), except that it does not apply to any procurement covered by other subparts of this part. Orders for supplies and services placed *within* a Military Department shall be in accordance with procedures prescribed by that Department.

§ 5.701 Authorization and policy relating to placing and filling orders.

(a) It is the policy of the Department of Defense not to place Government agencies in direct competition with commercial sources. Accordingly, prior to soliciting bids or proposals from commercial sources, it shall be decided whether to obtain supplies or services from Government agencies. Invitations for bids and requests for proposals shall not be sent to Government agencies. Current market prices, recent procurement prices, or prices obtained by informational bids as provided in § 1.309 of this chapter may be used to ascertain whether procurement can be effected more cheaply from commercial sources.

(b) Each procuring activity, when it is in the interest of the Government to do so, may place delivery orders, on DD Form 1155 (see § 16.303 of this chapter), with any other Government department or agency for supplies or services that any such requisitioned department or agency may be in a position to furnish or perform or to obtain by contract. Generally, an order for supplies or services will not be placed with a department or agency which is not in a position to furnish the supplies or is not equipped to perform the services, except that an order may be filled by means of an outside contract with a commercial source of supply if the order is placed by any one of the following: Department of the Army, Department of the Navy, Department of the Air Force, Department of the Treasury, Civil Aeronautics Administration, or Maritime Commission. An order for services shall not be placed with a department or agency when such services can be performed as conveniently or more cheaply by private contractors.

§ 5.702 Determination of amount and method of payment.

Upon the written request of the requisitioned department or agency, an advance by check shall be made of all or part of the estimated cost of furnishing the supplies or services as specified by such requisitioned department or agency: *Provided*, That, where an advance is made, proper adjustments of the basis of the actual cost of the supplies or services shall be made as may be agreed upon by the departments or agencies concerned. Subject to approval by the requisitioned department or agency, payment by check may be made after the furnishing of the supplies or services. The amount to be paid shall be based on the actual cost of the supplies or services as may be agreed upon by the departments or agencies concerned.

Subpart H—Procurement of Certain Utility Services by Use of General Services Administration Area Contracts

§ 5.800 Applicability.

This subpart is not applicable to the procurement of utility services outside the United States.

§ 5.801 General.

The General Services Administration enters into indefinite delivery type area contracts with various utility companies for the furnishing of electricity, natural and manufactured gas distributed by pipes, steam, sewerage, or water to all, or substantially all, Government agencies located within specified areas. GSA area contracts provide that the contractor will, upon receipt of an order in the form prescribed by the contract, furnish, without further negotiation as to rates and charges, the services involved in accordance with such of its established and filed rate schedules as are applicable to the service.

§ 5.802 Distribution of GSA Public Utility Schedules and related publications.

A list of the utility services obtainable under GSA area contracts, including the area served and the name of the contractor involved, is contained in GSA Circular No. 61, Revised. GSA also has available for use with each area contract a Public Utility Schedule which includes the required order form. Copies of GSA Circular No. 61 and GSA Public Utility Schedules may be obtained, upon request, from Public Utilities Division, Transportation and Public Utilities Service, General Services Administration, Washington 25, D. C.

§ 5.803 Department of Defense use of GSA area contracts.

(a) Where GSA area contracts are adequate to meet the requirements of Department of Defense activities for utility services, such services shall be procured thereunder. In determining whether a GSA area contract is adequate to meet the requirements of the using activity, consideration should be given to (1) the area contract rates viewed in light of the magnitude of the service required, (2) any unusual characteristics of the service required, (3) any special equipment or facility requirements, (4) any special technical contract provisions required, and (5) any other special circumstances.

(b) Where it is determined by the Department concerned that GSA area contracts do not meet the requirements of the using activity, the utility services shall be procured in accordance with § 16.501 of this subchapter.

§ 5.804 Ordering under area contracts.

When utility services are procured under GSA area contracts, the method of ordering prescribed in the appropriate GSA Public Utility Schedule shall be used. The form prescribed for ordering may be modified to satisfy fiscal and administrative requirements of the Military Department concerned, and to contain such additional contract provisions as may be necessary, except that it shall not be modified for use as a public voucher in lieu of Standard Form 1034. Where GSA area contracts do not contain the Gratuities clause (§ 7.104–16 of this chapter) the clause shall be included in the order form.

Subparts I Through J—[Reserved]

Subpart K—Coordinated Procurement

§ 5.1100 Definitions.

As used in this subchapter, the following terms have the meanings set forth below:

§ 5.1100–1 Coordinated procurement.

Coordinated procurement refers to procurement (a) of supplies and services pursuant to § 5.1116 and (b) of supplies under single procurement as defined in § 5.1100–2.

§ 5.1100–2 Single procurement.

Single procurement refers to procurement of supplies pursuant to assignments of procurement responsibility made by the Secretary of Defense. The following are approved types of single procurement.

(a) Single department procurement, whereby one Military Department procures certain supplies to satisfy the requirements of all the Military Departments.

(b) Plant cognizance procurement, whereby one Military Department procures certain supplies from a particular plant to satisfy the requirements of all the Military Departments. This type of procurement is limited presently to airframes, aircraft engines, and propellers.

(c) Joint procurement, whereby a jointly staffed and financed agency within the Department of Defense procures certain supplies to satisfy the requirements of all the Military Departments.

§ 5.1100–3 Requiring department.

Requiring department refers to the Military Department originating a requisition or purchase request for supplies.

§ 5.1100–4 Procuring department.

Procuring department refers to the Military Department or agency which is assigned the procurement responsibility for the supplies.

§ 5.1100–5 Military interdepartmental purchase request (MIPR).

Military interdepartmental purchase request (MIPR) refers to DD Form 448 (Military Interdepartmental Purchase Request) (see § 16.601 of this subchapter) executed by a Requiring Department, as a request for supplies to be procured or furnished by the Procuring Department, or to be manufactured in its own facilities.

§ 5.1101 Application of procurement assignment.

Single procurement in the form of single department, joint agency, or plant cognizance procurement shall be effected whenever it will result in net advantages to the Department of Defense as a whole, except so far as it can be demonstrated that the use of such a procurement method will adversely affect military operations. Single department procurement assignments in Alaska, Hawaii, and outside the remainder of the United States, regardless of funds utilized, will be determined by the respective Unified Commanders. Implementation of such assignments will be effected within the unified commands under the direction of the Unified Commander.

§ 5.1102 Responsibilities under single procurement.

§ 5.1102–1 Single department procurement.

The Procuring Department is generally responsible for the following, under single department procurement (for specific assignment of procurement responsibilities, see Department of Defense Instruction Number 4115.1, dated March 18, 1957, Subject: Department of Defense Single Procurement Assignments, and any amendments thereto);

(a) Operational phases of procurement planning (phasing the submission of requirements, consolidating or dividing requirements, analyzing the market, and determining patterns for the phased placement of orders in such a manner as to assure meeting the needs of the Military Departments at the lowest possible price to the Government, and at the same time avoiding unnecessary peaks and valleys of production);

(b) Purchasing;

(c) Contract administration, including arrangements for followup and expediting;

(d) Acquisition of licenses under patents or other proprietary rights covering the subject matter of the procurement and the settlement of patent infringement claims arising out of the procurement. Approval of the Military Department or Departments whose funds are to be charged for the acquisition of licenses or settlement of claims will be obtained;

(e) Arrangement for inspection; and

(f) Arrangement for transportation.

§ 5.1102–2 Joint procurement.

Responsibilities for procurement by a Joint agency are as set forth in the individual agency charter.

§ 5.1102–3 Plant Cognizance Procurement.

Responsibilities for procurement and mobilization planning are as set forth in Department of Defense Instruction Number 4115.1, dated March 18, 1957, Subject: Department of Defense Single Procurement Assignments, and any amendments thereto.

§ 5.1103 General principles governing implementation of procurement assignments.

§ 5.1103–1 Standard format — development and promulgation of implementing procedures.

Implementation of a procurement assignment shall be accomplished in accordance with Section V (implementation) Department of Defense Instruction 4115.1, dated March 18, 1957, Subject: Department of Defense Procurement Assignments, and any amendments thereto.

§ 5.1103–2 Relationship between research and development and single procurement.

Items are not subject to procurement assignment until they have reached the production stage.

§ 5.1103–3 Small dollar value purchases.

Requirements of small dollar value will be procured in accordance with the provisions of the approved implementing procedures covering the particular assignment. Such implementing procedures will normally provide a small dollar value limitation of $1,000 per line item; however, in special situations the limitation may vary depending upon the commodity area and may be expressed either in a higher or lower dollar value, by tonnage, less-than-carload lot quantities, or other units, as appropriate. Such implementing procedures will clearly state that requirements of a value or quantity less than the prescribed limitations will, wherever feasible, be procured by the Requiring Department. A MIPR for nonmilitary type items of a value or quantity less than the prescribed limitations will contain a notation that procurement by the Requiring Department was not considered to be feasible. A MIPR for a military type item need not contain such a notation. The Procuring Department will not return a MIPR submitted in accordance with the foregoing but will procure such items.

§ 5.1103–4 Emergency.

In case of emergency, where the exigencies of the situation will not permit of the delay incident to following the normal channels of single procurement, purchases may be made without the prior authorization of the Procuring Department. When such emergency purchases are made, one copy of the contractual instrument, bearing or accompanied by a statement of the emergency, shall be transmitted promptly to the purchasing activity of the Procuring Department.

§ 5.1103–5 Department of Defense Manufacturing Establishment.

When procurement assignments have been made for items required by manufacturing establishments of the Military Departments, these items shall be obtained through the facilities of the Procuring Department unless such action will unduly hinder or delay production. When procurements are made other than through the Procuring Department, one copy of the contractual instrument bearing or accompanied by a statement of the circumstances necessitating such procurement shall be transmitted promptly to the purchasing activity of the Procuring Department. This section is not applicable when purchases are made pursuant to § 5.1103–3.

§ 5.1103–6 Local purchase as normal means of supply.

When local purchase of any nonmilitary type item has been authorized by a Requiring Department as the normal means of supply, such item may be obtained by that Department without regard to limitations prescribed in the procurement assignment implementing procedures. This authority will apply only while such item remains in "local purchase" status. For purposes of procurement and administrative planning, a Requiring Department will submit to the Procuring Department a list of the assigned items which have been authorized for local purchase, identified by the commodity area in which such items are classified and the dates on which such authorization for local purchase will be effective. Similar lists will be so submitted covering items being converted from a local purchase to a central procurement status.

§ 5.1104 Items in short supply.

In cases where shortages develop in supplies being purchased, the normal procedure will be to resolve the problem on a Departmental level. If mutual agreement cannot be reached, the subject shall be referred to the Assistant Secretary of Defense (Supply and Logistics) for decision.

§ 5.1105 Transfer of uncompleted contracts.

§ 5.1105–1 Effect of assignment of procurement responsibility.

As a general rule, when the procurement responsibility for a commodity or class of commodities is assigned to one Department, uncompleted contracts of any other Department for any such commodity or class of commodities will not be transferred but will continue to be administered for all purposes by such other Department.

§ 5.1105–2 Disputes under transferred contracts.

In the case of any contract transferred, or to be transferred, from one Department to another Department, which contract refers to either the Navy Department Board of Contract Appeals or the Army Board of Contract Appeals, the contract should be amended to provide that the Armed Services Board of Contract Appeals will hear and decide all

disputes concerning questions of fact which are appealed pursuant to the "Disputes" clause of such transferred contract.

§ 5.1105–3 Contracting officers under transferred contracts.

In the case of any contract transferred, or to be transferred, to any Department, the successor to the contracting officer for each such contract shall be the Head of the Procuring Activity (or any contracting officer thereof) to which the administration of any such contract is assigned, and any such successor shall have all of the rights and responsibilities of a contracting officer under such transferred contract.

§5.1106 Purchase authorization.

§ 5.1106–1 MIPR's or other authorized procurement requests.

Military Interdepartmental Purchase Requests or other authorized procurement requests (see Subpart F, Part 16 of this subchapter), when received by the Procuring Department, shall be the authority to procure the supplies listed thereon in accordance with agreements between the Departments concerned. The Procuring Department has no responsibility to determine the validity of a stated requirement in an approved procurement request; however, it should bring to the attention of the Requiring Department apparent errors in the requirement. In coordinated procurement, the Procuring Department is authorized without referral to the Requiring Department, to deviate by 3 percent of the amount stated for each accounting classification, provided, that the sum of such deviation does not exceed 3 percent of the total amount cited in the MIPR. The Procuring Department is authorized to deviate by more than 3 percent in specific assigned commodity areas where mutual agreement has been reached and so indicated in the implementing procedures in accordance with DOD Directive 4115.28. This authorization will remain available to the Procuring Department until acceptance is completed, at which time any excess funds on the MIPR will be rescinded by the Requiring Department without the issuance of a formal amendment to the MIPR. The Requiring Department will authorize the percent variation on each MIPR, and will reserve a net amount sufficient to provide for such variation. If the deviation exceeds this percentage, referral to the Requiring Department will be necessary.

§ 5.1106–2 Determinations and findings.

(a) When procurement is by negotiation, the Procuring Department, except as provided in paragraphs (b) and (c) of this section, shall make the determinations and findings in accordance with Subpart C, Part 3 of this subchapter with respect to coordinated procurement. The Requiring Department shall furnish with the procurement request the information required by the Procuring Department to develop the determinations and findings.

(b) With respect to 10 U.S.C. 2304 (a)(13), the Requiring Department shall make the determinations and findings in accordance with Subpart C, Part 3 of this subchapter. Two copies of the determinations and findings shall be attached to the procurement request and shall be utilized by the Procuring Department as authority for negotiation, and the Procuring Department need not make further determinations and findings.

(c) With respect to 10 U.S.C. 2304 (a)(16) and when the procurement agreements under § 5.1116 (as distinguished from single procurement) do not include mobilization planning responsibility, the Requiring Department shall make the determinations and findings in accordance with Subpart C, Part 3 of this subchapter. Two copies of the determinations and findings shall be attached to the procurement request and shall be utilized by the Procuring Department as authority for negotiation, and the Procuring Department need not make further determinations and findings. With respect to single procurement (§ 5.1100–2), the Procuring Department shall make the determinations and findings.

§ 5.1107 Components of end items.

§ 5.1107–1 Contractor-furnished components.

In the procurement of end items where the contractor normally secures all components thereof from his own source (not Government-furnished), the procurement assignment does not apply to the component items required by such contractor.

§ 5.1107–2 Government-furnished components.

In the procurement of end items where the Government furnishes components which are covered by a procurement assignment, such components shall be procured in accordance with the procurement assignment. However, direct purchase may be made by a Requiring Department in exceptional cases where agreement is reached with the Procuring Department.

§ 5.1107–3 Purchase of components over and above those initially purchased with the end item.

The Procurement of components covered by a procurement assignment, and above those initially purchased with the end item, shall be effected in accordance with the procurement assignment. However, direct purchase may be made by a Requiring Department in exceptional cases where agreement is reached with the Procuring Department.

§ 5.1108 Funds and payments.

§ 5.1108–1 Citation of appropriation and funds of Requiring Department.

Contracts and orders shall cite the appropriations or funds of the Requiring Department unless it is not considered feasible and economical to relate payments directly to the end item and ultimate use of the material under procurement. The Procuring Department will, for each commodity, determine which type of funding (direct citation or consolidated-reimbursable procurement) will generally be used. The conditions under which it is considered not feasible to cite the funds of the Requiring Department are:

(a) Procurement of the end item involves separate procurement of components to be assembled by the Procuring Department.

(b) At the time of acceptance of the purchase request (MIPR), it is not considered feasible to identify specific quantities of the end item with respective Requiring Department because of the possibility of allocation of the material upon a different basis as completed items are delivered.

(c) Payments will be made without reference to deliveries of end items; for example, cost-plus-fixed-fee contracts, and fixed-price contracts with progress payment clauses.

§ 5.1108–2 Citation of funds of Procuring Department.

In cases where citation of the funds of the Requiring Department is not feasible, funds of the Procuring Department will be cited subject to reimbursement upon delivery to the Requiring Department. In those cases, contracts and orders will provide for payment by the Procuring Department.

§ 5.1109 [Reserved]

§ 5.1110 Administrative costs.

The Procuring Department shall bear, without reimbursement therefor, the administrative costs incidental to its procurement of supplies for another Department. However, when a procurement responsibility is transferred from one Department to another Department, funds appropriated or to be appropriated for defraying the administrative costs of such procurement responsibility shall be made available to the successor Procuring Department which shall assume budget cognizance at the earliest possible date.

§ 5.1111 Inspection.

Policies and procedures concerning inspection and acceptance for use in conjunction with this Part are set forth in Part 14 of this subchapter.

§ 5.1112 Execution and administration of contracts.

Generally, the Procuring Department will execute a single contract where an award embodying the requirements of more than one Department is made to a single contractor. Administration of contracts shall be in accordance with the procedures developed by the Procuring Department in accordance with § 5.1103–1.

§ 5.1113 Status reporting.

Appropriate systems of followup shall be maintained by the Procuring Department in order that contracting personnel may be currently informed as to the performance by a contractor and to further insure that Requiring Departments are apprised of the status of contracts.

§ 5.1114 Specifications.

The Requiring Department shall be responsible for providing the Procuring Department a list of (or copies of) specifications required for purchase. Under no circumstances will the Procuring De-

partment direct or authorize deviations or waivers from the specifications cited in the MIPR without express authority of the Requiring Department.

§ 5.1115 Transportation of supplies.

Subject to the provisions of Subpart M, Part 1 of this subchapter, every requisition or procurement request shall show the appropriation or fund and accounting classification chargeable for such transportation costs as may be incurred in effecting delivery at Government expense. Government bills of lading, when required, will generally be issued by the Procuring Department. In every instance, the Government bill of lading shall show (a) the Requiring Department as the Department to be billed, and (b) the appropriation or fund designated by that Department as the appropriation chargeable. Where Government bills of lading of the Procuring Department are used to cover shipment of supplies consigned to the Requiring Department, the bill of lading number shall be prefixed by the name of the Requiring Department.

§ 5.1116 Procurement agreements.

10 U.S.C. 2308 provides that Military Department heads by agreement may make such assignments and delegations of procurement responsibilities from one Military Department to another or may create such joint or combined procuring activities or agencies as they deem necessary or desirable. Nothing set forth in this Subchapter shall preclude the Military Departments from making agreements under 10 U.S.C. 2308 which do not violate the single procurement policies and procedures set forth in this subpart or in applicable Department of Defense Directives, Instructions, and regulations.

Subpart L—Commodity Assignments

§ 5.1201 Commodity assignments to Military Departments.

The commodity assignments set forth below have been made by the Assistant Secretary of Defense (Supply and Logistics) to the Military Departments based upon studies made by the Armed Forces Supply Center. General exclusions are:

(a) Emergency procurements;

(b) Procurements not in excess of $2,500 or where only one of an item is to be procured;

(c) Authorized local purchase items;

(d) Research and development items;

(e) Items which require continuous redesign or modification during the production phase; and

(f) Items excluded from coordinated procurement in accordance with DOD Directives.

Specific exclusions are set forth in the lists.

§ 5.1201–1 Department of the Army.

Federal supply class code	Commodity	Content
	ANTI-FREEZE	
6850 P	Miscellaneous chemical specialties	Includes: Anti-freeze compounds which contain ethylene glycol, only.
	BATTERIES, DRY CELL	
6135 P	Batteries, primary	Includes: JAN type, dry cell batteries, only.
	MILITARY CHEMICAL WARFARE EQUIPMENT AND SUPPLIES [1]	
4230 P	Decontaminating and impregnating equipment.	Includes: Items peculiar to chemical warfare only.
4240 P	Safety and rescue equipment	Includes: Military respiratory protective equipment for chemical warfare only.
6630 P	Chemical analysis instruments	Includes: Instruments peculiar to chemical warfare only.
6640 P	Laboratory equipment and supplies	Includes: Chemical laboratories (assembled outfits) only.
6665 P	Hazard-detecting instruments and apparatus.	Includes: Items peculiar to chemical warfare only.
6810 P	Chemicals	Includes: Calcium hypochlorite only.
6820 P	Dyes	Includes: Items peculiar to chemical warfare only.
6850 P	Miscellaneous chemical specialties	Includes: Agents decontaminating; and impregnites for military protective clothing for chemical warfare only.
6910 P	Training aids	Includes: Items peculiar to chemical warfare only.

See footnotes at end of § 5.1201–3.

Federal supply class code	Commodity	Content
	CONSTRUCTION AND AGRICULTURAL EQUIPMENT AND TRACTORS	
2410	Tractors, full track, low speed	
2420	Tractors, wheeled	
2520 P	Vehicular power transmission components.	Includes: Components peculiar to construction, excavating, highway maintenance, agricultural machinery and equipment, and tractors only.
2530 P	Vehicular brake, steering, axle, wheel, and track components.	Includes: Components peculiar to construction, excavating, highway maintenance, agricultural machinery and equipment, and tractors only.
2540 P	Vehicular furniture and accessories	Includes: Furniture, and accessories peculiar to construction, excavating, highway maintenance, agricultural machinery and equipment, and tractors only.
2590 P	Miscellaneous vehicular components	Includes: Misc. components peculiar to construction, excavating, highway maintenance, agricultural machinery and equipment only.
3210	Sawmill and planning machinery	
3695 P	Miscellaneous special industry machinery.	Includes: Specialized logging equipment only.
3710	Soil preparation equipment	
3720	Harvesting equipment	
3740	Pest, disease, and frost control equipment.	
3750 P	Gardening implements and tools	Includes: Garden tractors, walking type only.
3805	Earth moving and excavating equipment.	
3810	Cranes and crane-shovels	
3815	Crane and crane-shovel attachments	
3820	Mining, rock drilling, earth boring, and related equipment.	
3825	Road clearing and cleaning equipment	
3830	Truck and tractor attachments	
3895	Miscellaneous construction equipment.	
5420	Bridges, fixed and floating	
5440 P	Scaffolding equipment and concrete forms.	Includes: Concrete forms only.
5680 P	Miscellaneous construction materials	Includes: Landing mats, landing mat sets, and parts peculiar.
	DRUMS AND CANS	
7240 P	Household and commercial utility containers.	Includes: 5 gal. metal containers only.
8110 P	Drums and cans	Includes: 55 gal. 16 gage; and 5 gal. metal drums and cans only.
	ELECTRONIC EQUIPMENT FIRE FIGHTING, WATER PURIFICATION, AND SEWAGE TREATMENT EQUIPMENT [2]	
4210 P	Fire fighting equipment	Excludes: Airport crash fire fighting vehicles under DOD procurement assignment to the Air Force.
4610 P	Water purification equipment	Excludes: Kits, desalter; and stills, water, solar heated, lifesaving which are under DOD procurement assignment to the Navy.
4620 P	Water distillation equipment, marine and industrial.	Excludes: Distilling plants when purchased for use aboard those vessels under DOD procurement assignment to the Navy.
4630	Sewage treatment equipment	
	FOOD PREPARATION AND SERVING EQUIPMENT [3]	
7310 P	Food cooking, baking, and warming equipment.	Includes: Covers, steam table inset; covers, steam table pans, insets, steam tables; and pans, steam table.
7330 P	Kitchen hand tools and utensils	Excludes: Blades, bakers' peel; bottles, insulated; bottles, vacuum; boxes, spice; cases, insulated food container; covers, insulated food container; fillers, vacuum bottle; food containers, insulated; food containers, vacuum, handles, bakers' peel, wood; inserts, insulated food containers; jugs, insulated; jugs, vacuum; liners, baking cup; openers, can, electric; spice boxes; stands, heating, canteen cup; and tubs, dough mixing.
7340 P	Cutlery and flatware	Excludes: Plastic and wood cutlery and flatware; knives, Boy Scout; knives, hunting; knives, pocket; scissors, embroidery; scissors, ladies'; shears, pinking; and all items of silverware not specifically named among these exclusions.

Federal supply class code	Commodity	Content
	FOOD PREPARATION AND SERVING EQUIPMENT [3]—continued	
7350 P	Tableware	Excludes: Brackets, bulkhead, vacuum pitchers; breakers, bread; breakers, bread, metal; breakers, water, metal; breakers, water, wood; caps, breaker, water; carafes, vacuum; coffee servers, vacuum; dispensers, drinking water, portable; fillers, vacuum pitcher; pitchers, vacuum; toothpicks; tubes, drinking; and all items of silverware not specifically named among these exclusions.
7360 P	Sets, kits, and outfits, food preparation and serving.	Includes: Sets, kits, and outfits consisting of food preparation and serving equipment in the FSC Class 7310(P), 7330(P), 7340(P), and 7350(P) under DOD procurement assignment to the Department of the Army.
	LUMBER, MILLWORK, PLYWOOD, AND VENEER	
5430 P	Storage tanks	Includes: Tanks, wood, storage only.
5450 P	Miscellaneous prefabricated structures	Includes: Cooling towers, wood; and silos, wood; only.
5510	Lumber and related basic wood materials.	
5520	Millwork	
5530	Plywood and veneer.	
5630 P	Pipe and conduit, nonmetallic	Includes: Pipe, wood only.
5650 P	Roofing and siding materials	Includes: Shingles, wood only.
5660 P	Fencing, fences, and gates	Includes: Fence sections and gates, wood only.
8110 P	Drums and cans	Includes: Cooperage stock and vats wood (containers); only.
8115 P [4]	Boxes, cartons, and crates	Includes: Box, crate, and package shook only.
	MORTUARY EQUIPMENT AND SUPPLIES	
4110 P	Self-contained refrigration units and accessories.	Includes: Mortuary refrigerators only.
5340 P	Miscellaneous hardware	Includes: Casket hardware only.
9930	Memorials; cemeterial and mortuary equipment and supplies.	
	MOTOR VEHICLES, TRAILERS, AND CYCLES	
2310	Passenger motor vehicles	
2320 P	Trucks and truck tractors	Excludes: Tracked landing vehicles, which are not under DOD procurement assignment; and airport crash rescue vehicles, which are under DOD procurement assignment to the Department of the Air Force.
2330 P	Trailers	Excludes: Two wheel lubrication trailers, two wheel steam cleaning trailers, and troop transporter semitrailers, which are not under DOD procurement assignment; and airport crash rescue trailer units, which are under DOD procurement assignment to the Department of the Air Force.
2340 P	Motorcycles, motor scooters, bicycles	Excluded: Bicycles and tricycles.
2430	Tractors, track laying high speed	
2510 P	Vehicular cab, body, and frame structural components.	Includes: Components peculiar to military motor vehicles only.
2520 P	Vehicular power transmission components.	Includes: Components peculiar to military motor vehicles only.
2530 P	Vehicular brake, steering axles, wheel, and track components.	Includes: Components peculiar to military motor vehicles only.
2540 P	Vehicular furniture and accessories	Includes: Furniture and accessories peculiar to military motor vehicles only.
2590 P	Miscellaneous vehicular components	Includes: Components peculiar to military motor vehicles only.
2910 P	Engine fuel system components, nonaircraft.	Includes: Components peculiar to military motor vehicles only.
2930 P	Engine cooling system components, nonaircraft.	Includes: Components peculiar to military motor vehicles only.
2940 P	Engine air and oil filters, strainers, and cleaners, nonaircraft.	Includes: Filters, strainers, and cleaners peculiar to military motor vehicles only.
2990 P	Miscellaneous engine accessories, nonaircraft.	Includes: Accessories peculiar to military motor vehicles only.
	PAPER AND PAPER PRODUCTS	
5970 P	Electrical insulators and insulating materials.	Includes: Insulating paper, electrical only.
8105 P	Bags and sacks	Includes: Bags, paper, coffee; bags, paper, flour; bags, paper, garment; bags, paper, kraft; bags, paper, shipping multiwall; bags, paper, waterproof; envelopes, packaging; paper; envelopes, packing list, paper; fiberboard packing list protectors; liners, bag, crepe paper; sacks, paper, shipping, multiwall; only.
8110 P	Drums and cans	Includes: Chipboard mailing tubes; drums, fiber; drums, fiberboard, overseas type; drum sets, fiber, nested; filing tubes, fiber; tubes, mailing and filing, fiber, only.
8115 P	Boxes, cartons, and crates	Includes: Baskets, fiber, shipping; boxes, chipboard, folding; boxes, set-up, paperboard; cartons, folding, paperboard; only.
8130 P	Reels and spools	Includes: Reels, paperboard; and spools, paperboard only.
8135 P	Packaging and packing bulk materials.	Excludes: Paper stocks controlled by the Congressional Joint Committee on Printing.
8540	Toiletry paper articles	
9310 P	Paper and paperboard	Excludes: Paper stocks controlled by the Congressional Joint Committee on Printing.
9920 P	Smokers' articles and matches	Includes: Cigarette paper packaged only.
	RAILWAY EQUIPMENT	
2110	Locomotives	
2220	Rail cars	
2230 P	Right-of-way construction and maintenance equipment	Excludes: Locomotives cranes which are under DOD procurement assignment to the Department of the Navy, and specialized types of locomotive cranes used in overseas areas with other than U.S. standard gauges and standard clearances which are not under DOD procurement assignment.
2240	Locomotive and rail car accessories and components.	
2250	Track materials, railroad	
	TELEPHONE AND TELEGRAPH EQUIPMENT AND COMPONENTS, MILITARY	
5805 P	Telephone and telegraph equipment	Includes: Military (wire) equipment, field type, only.
5815 P	Teletype and facsimile equipment	Includes: Military (wire) equipment, field type, only.
5830 P	Intercommunication and public address systems, except airborne.	Includes: Military (wire) equipment, field type, only.
5915 P	Filters and networks	Includes: Components of military (wire) equipment, field type, only.
5950 P	Coils and transformers	Includes: Components of military (wire) equipment, field type, only.
5965 P	Headsets, handsets, microphones, and speakers.	Includes: Components of military (wire) equipment, field type, only.
5985 P	Antennae, waveguides, and related equipment.	Includes: Cases, wire dispenser for military (wire) equipment, field type, only.
5995 P	Cable, cord, and wire assemblies: Communication equipment.	Includes: Components of military (wire) equipment, field type, only.
6145 P	Wire and cable, electrical	Includes: Wire and cable for military (wire) equipment, field type, only.
6625 P	Electrical and electronic properties measuring and testing instruments.	Includes: Instruments for testing military (wire) equipment, field type, only.
6940	Communication training devices	Includes: Code training sets, code practice equipment, and other telephone and telegraph training devices, only.
8130 P	Reels and spools	Includes: Reels and spools for military (wire) equipment, field type, only.
	TIME MEASURING INSTRUMENTS	
6645 P [5]	Time measuring instruments	Includes: All watches; aircraft instrument panel clocks; and spare parts thereof, as follows: aircraft clocks; aircraft panel clocks; athletic timers; cases, carrying, navigational watch; cases, watch, pocket; clocks, aircraft, mechanical; holders, watch; navigation watches, master; pocket watches; stop watches; watches, wrist, second, setting; watch case assemblies; watch movements; wrist watches.
6695 P	Combination and miscellaneous instruments.	Includes: Jewel bearings, only.
	TIRES AND TUBES [7]	
2610	Tires and tubes, pneumatic, except aircraft.	
2630	Tires, solid and cushion	

See footnotes at end of § 5.1201-3.

Federal supply class code	Commodity	Content
	WEAPONS, FIRE CONTROL EQUIPMENT, AMMUNITION AND EXPLOSIVES [5]	
1005 P [4]	Guns, through 30-mm	Includes: Guns, through 30-mm, and parts equipment therefor, as listed in Army Supply Manuals SM 9-5-1005, 10, 15; SM 9-1005, 10, 15. Excludes: Naval Ordnance type; Mk-12, 20-mm gun; aircraft gun mounts; and all other types not included above.
1010 P [6]	Guns, over 30-mm up to 75-mm	Includes: Guns, over 30-mm up to 75-mm, and parts and equipment therefor; as listed in Army Supply Manuals SM 9-5-1005, 10, 15; SM 9-1-1005, 10, 15. Excludes: Naval Ordnance type; aircraft gun mounts, and all other types not included above.
1015 P [6]	Guns, 75-mm through 125-mm	Includes: Guns, 75-mm through 125-mm, and parts and equipment therefor; as listed in Army Supply Manuals SM 9-5-1005, 10, 15; SM 9-1-1055, 10, 15. [6] Excludes: Naval Ordnance type; aircraft gun mounts; and all other types not included above.
1020 P [6] 1025 P [6] 1030 P [6] 1035 P [6]	Guns, over 125-mm	Includes: Guns, over 125-mm, and parts and equipment therefor; as listed in Army Supply Manuals SM 9-5-1025, 30; SM 9-1-1025, 30 Excludes: Naval Ordnance type and all other types not included above.
1040 [6]	Chemical weapons and equipment.	
1055 P [6]	Launchers, rocket and pyrotechnic	Includes: Launchers, rocket and pyrotechnic, as listed in Army Supply Manuals SM 9-5-1055; SM 9-1-1050, 55. Excludes: Naval Ordnance type; airborne type; and all others not included above.
1095 P [6]	Miscellaneous weapons	Includes: Miscellaneous weapons, and parts and equipment therefor, as listed in Army Supply Manuals SM 9-5-1090, 95; SM 9-1-1090, 95. Excludes: Naval Ordnance type; guns, line throwing (which are under DOD procurement assignment to the Navy); aircraft type misc. weapons; and all others not included above.
1210 P [6]	Fire control directors	Includes: Fire control equipment, as listed in Army Supply Manuals SM 9-1-1210, 20, 30, 40; SM 9-1-1210, 20, 30, 40, 50, 60, 90; SM 9-5-1290. Excludes: Naval Ordnance type and aircraft type.
1220 P [6]	Fire control computing sights and devices.	
1230 P [6]	Fire control systems, complete	
1240 P [6]	Optical sighting and ranging equipment.	
1250 P [6]	Fire control stabilizing mechanisms	Includes: Fire control equipment, as listed in Army Supply Manuals SM 9-5-1210, 20, 30, 40; SM 9-1-1210, 20, 30, 40, 50, 60, 90; SM 9-5-1290. Excludes: Naval Ordnance type and aircraft type.
1260 P [6]	Fire control designating and indicating equipment.	
1265 P [6]	Fire control transmitting and receiving equipment, except airborne.	
1285 P [6]	Fire control radar equipment, except airborne.	
1290 P [6]	Miscellaneous fire control equipment	
1305 P [6]	Ammunition, through 30-mm	Includes: Ammunition, through 30-mm, as listed in Army Supply Manual SM 9-5-1305. Excludes: Naval Ordnance type; ammunition for the Mk-12, 20-mm gun; and all other types not included above.
1310 P [6 12]	Ammunition, over 30-mm up to 75-mm.	Includes: Ammunition, over 30-mm up to 75-mm, as listed in Army Supply Manual SM 9-5-1310. Excludes: Naval Ordnance type; 40-mm ammunition (which is under DOD procurement assignment to the Navy); and all other types not included above.
1315 P [6 13]	Ammunition, 75-mm through 125-mm	Includes: Ammunition, 75-mm through 125-mm, as liste in Army Supply Manual SM 9-5-1315; Army Supply Catalog CML 5-1-1. Excludes: Naval Ordnance type; and all other types not included above.
1320 P [6 13]	Ammunition, over 125-mm	Includes: Ammunition, over 125-mm, as listed in Army Supply Manual SM 9-5-1320; Army Supply Catalog CML 5-1-1. Excludes: Naval Ordnance type; and all other types not included above.

Federal supply class code	Commodity	Content
	WEAPONS, FIRE CONTROL EQUIPMENT, AMMUNITION AND EXPLOSIVES—continued	
1325 P	Bombs	Includes: Bombs as listed in Army Supply Manuals SM 9-5-1325; SM 3-5-1325, 30, 40, 45, 65, 70, 75. Excludes: Those bombs herein assigned to the Navy; and all others not included above.
1330	Grenades	
1340 P	Rockets and rocket ammunition	Includes: HE, AT, 3.5 In., M35; Practice, 3.5 In., M36; Smoke, WP, 3.5 In., M30; Drill, 4.5 In., M24; HE, 4.5 In., M32; Practice, 4.5 In., M33; incendiary and toxicological rockets, as listed in Army Supply Bulletin SB 3-33. Excludes: Rockets herein assigned to the Navy; and all others not included above.
1345	Land mines	
1365	Military chemical agents	
1370 P	Pyrotechnics	Excludes: Shipboard and aircraft pyrotechnics.
1375 P	Explosives, bulk propellants and explosive devices. Blasting Agents and Supplies.	Includes: Blasting agents and supplies such as: blocks, demolition; caps, blasting, electric and nonelectric; charge, cratering; charges, shaped and demolition; cord, detonating; detonators, all types; dynamite; firing devices; fuse, safety; Bangalore torpedo; kit demolition; lighter, fuse; primer, percussion cap; demolition equipment sets with ancillary items; chests, demolition platoon and squad; machine, blasting. Excludes: Navy underwater demolition requirements.
	Explosives	Includes: The following items only: Ammonium picrate (explosive D) JAN-A-166A; trinitrotoluene (TNT) JAN-T-248; tetryl JAN-T-339; pantaerythrite tetranitrate (PETN) JAN-P-387; RDX; coinposition B; composition B-3; pentolite, 50/50 JAN-P-408; composition C-3; composition A-3; composition A-4; nitroguanidine (picrite). Excludes: Production capacity for any of the above listed explosives at the U.S. Naval Propellant Plant, Indian Head, Md.; and all other explosives not included above.
	Propellants	Includes: Propellants for small arms ammunition, calibers, .30- to 30-mm, inclusive, except blank and cal. .45; propellant (for small arms ammunition, caliber .45 MIL-P-3207; propellant, increment, M8 MIL-P-10557; propellant, M9; powder, rocket propellant, type N-4 MIL-P-16401; propellant cannon, M1, M6, M14, JAN-P-309; propellant cannon, M2, M5, JAN-P-323; propellant, 4.2 In. chemical mortar; propellant, M7, M15 and M17 MIL-P-668A; propellant, M10; rocket propellant powder NAVORD OS 3383. Excludes: Production capacity for any of the above listed propellants at the U.S. Naval Propellant Plant, Indian Head, Maryland; and all other propellants not included above.
1380	Military biological agents	
1390 P [6]	Fuzes and primers	Includes: Fuzes and primers for Army assigned ammunition and V.T. fuses, non-rotating types. Excludes: Naval Ordnance type; V.T. fuses, rotating type, under DOD procurement assignment to the Navy; guided missile fuzes; and all other fuzes and primers not included above.
2350	Tanks and self-propelled weapons	
6910 P	Training aids	Includes: Training Aids as listed in Army Supply Manuals SM 9-1-6910, 20; SM 9-5-6910, 20; SM 3-1-6900. Excludes: All other training aids not included above.
6920 P	Armament training devices	Includes: Armament training devices as listed in Army Supply Manuals SM 9-1-6910, 20; SM 9-5-6910, 20. Excludes: Clay pigeons; all other training devices not included above.
8140 P	Ammunition boxes, packages, and special containers.	Includes: Boxes, packages and containers for ammunition herein assigned to the Army, as listed in Army Supply Manuals SM 9-1-8140. Excludes: All other boxes, packages, and containers not assigned herein.

See footnotes at end of § 5.1201-3.

Federal supply class code	Commodity	Content
	ECCLESIASTICAL EQUIPMENT, FURNISHINGS AND SUPPLIES	
6910 P	Training aids	Includes: Visual aids, chaplain, nonprojected; only.
7195 P	Miscellaneous furniture and fixtures	Includes: Board, bulletin, chapel; only.
7710 P	Musical instruments	Includes: Organs, musical only.
9925	Ecclesiastical equipment, furnishings, and supplies.	
	ELECTRONIC EQUIPMENT [2]	
	FIBERS, FIBER ROPE, CORDAGE, AND TWINE	
4020	Fiber rope, cordage, and twine.	
9420	Fibers, vegetable, animal, and synthetic	
	FUELS, SOLID	
9110 P	Fuels, solid	Includes: Coal or coal products only.
	HAND TOOLS	
3439 P	Miscellaneous welding, soldering, and brazing supplies and accessories.	Includes: Only soldering irons, and soldering guns, and related parts and accessories only.
3750 P	Gardening implements and tools	Excludes: All powered gardening implements and tools.
5110	Hand tools, edged, nonpowered	
5120	Hand tools, nonedged, nonpowered.	
5133 P	Drill bits, counterbores, and countersinks: Hand and machine.	Includes: Bits, counterbores, and countersinks, hand only.
5136 P	Taps, dies, and collets: Hand and machine.	Includes: Taps, dies, and collets, hand only.
5140	Tool and hardware boxes	
5180 P	Sets, kits, and outfits of hand tools	Includes: Sets, kits, and outfits of nonpowered hand tools only.
5210	Measuring tools, craftmans'	
5280 P	Sets, kits, and outfits of measuring tools.	Excludes: Sets, kits, and outfits of inspection gages, and precision layout tools.
	LIFESAVING EQUIPMENT, MARINE [11]	
2040 P	Marine hardware and hull items	Includes: Anchor, sea; oars, sectional, aluminum; paddles; and paddles, telescoping, hand only.
4220 P	Marine lifesaving and diving equipment.	Includes: The following items only: Basket, search and rescue. Buoy, breeches. Cases, carrying, deflated raft. Containers, emergency equipment life raft. Containers, pararaft kit. CO_2 cylinders for inflatable life preservers and life rafts. Cushions, buoyant. Equipment, containers, coated nylon. Harness, for lifting personnel aboard ship. Inflation gear, complete and parts therefor (life raft). Kits, accessory, life raft. Kits, canvas repairing, for lifeboats, rafts and jackets. Life buoys, ring. Life floats (platform net rigging). Life preservers. Life preservers, pneumatic. Life rafts, pneumatic, airborne and shipborne. Life suits, waterproof. Life vest, shark chaser. Reflectors, corner, life raft. Water lifesaving nets and ladders.
4320 P	Power and hand pumps	Includes: Pump, hand only.
4610 P	Water purification equipment	Includes: Kits, desalter; and water stills, solar heated, lifesaving, only.
6230 P	Electric portable and hand lighting equipment.	Includes: Lantern, electric, automatic, floating; and lights, life preserver, only.
6350 P	Miscellaneous alarm and signal systems.	Includes: Mirrors, signalling only.
6605 P	Navigational instruments	Includes: Compasses, lifeboat and raft, only.
6850 P	Miscellaneous chemical specialties	Includes: Dye, sea marker, only.

See footnotes at end of § 5.1201-3.

Federal supply class code	Commodity	Content
	MATERIALS HANDLING EQUIPMENT	
2230 P	Right-of-way construction and maintenance equipment, railroad.	Includes: Diesel, electric; diesel, mechanical; gasoline, mechanical; and steam locomotive cranes; together with their peculiar parts, attachments and accessories; only. Excludes: Specialized types of locomotive cranes used in overseas areas with other than U.S. standard gauges and standard clearances which are not under DOD procurement assignment, and all other right-of-way construction and maintenance equipment, railroad, which is under DOD procurement assignment to the Department of the Army.
2520 P	Vehicular power transmission components.	Includes: Peculiar parts, attachments, and accessories for the materials handling equipment herein assigned to the Navy, only.
2530 P	Vehicular brake, steering, axle, wheel, and track components.	Includes: Peculiar parts, attachments, and accessories for the materials handling equipment herein assigned to the Navy, only.
2540 P	Vehicular furniture	Includes: Peculiar parts, attachments, and accessories for the materials handling equipment herein assigned to the Navy, only.
2590 P	Miscellaneous vehicular components	Includes: Peculiar parts, attachments and accessories for the materials handling equipment herein assigned to the Navy, only.
3910 P	Conveyors	Includes: Portable conveyor units (commercial warehouse type), only.
3920 P	Materials handling equipment, nonself-propelled.	Excludes: Parts, attachments, and accessories for push-carts, handcarts and wheelbarrows.
3930	Warehouse trucks and tractors, self-propelled.	
3940 P	Blocks, tackle, rigging and slings	Excludes: Aircraft blocks, tackle, rigging and slings.
3990	Miscellaneous materials handling equipment.	
6140 P	Batteries, secondary	Includes: Industrial batteries for electrically operated materials handling equipment, only.
	PAINTS AND SEALERS	
8010 P	Paints, dopes, varnishes, and related products.	Excludes: Dope thinners; enamel thinners; lacquer thinners; paint thinners (except turpentine and dispentene); thinners, dope and lacquer; thinners, synthetic resin enamel; thinners, paint, mineral spirits; these thinners are under DOD procurement assignment to MPSA.
8030 P	Preservative and sealing compounds	Includes: Caulking compounds, glazing compounds, and putties, only.
	PEST CONTROL AGENTS	
6840	Pest control agents and disinfectants	
	PREFABRICATED AND PORTABLE BUILDINGS	
5410 P	Prefabricated and portable buildings	Includes: The following prefabricated buildings covered by the designated military specifications, only: Building, arch rib 20′ x 48′, MIL–B–12568; Building, arch rib 40′ x 100′ MIL–B–16606; Building, (CAS) complete assembly structure, MIL–B–17579 (DOCKS); Building, rigid frame 40′ x 100′, MIL–B–16071A; Magazine, MIL–B–15494B; Magazine, MIL–B–16041A.
	SEXTANTS, AIRCRAFT	
6605 P	Navigational instruments	Includes: Sextants, aircraft, only.
	SHIPS, SMALL CRAFT, AND RELATED MARINE EQUIPMENT	
1905 P	Combat ships and landing vessels	Includes: Landing vessels only.
1910 P	Transport vessels, passenger and troop	Includes: Ferryboats, only.
1920	Fishing vessels	
1925	Special service vessels	
1930	Barges and lighters, cargo	
1935 P	Barges and lighters, special purpose	Excludes: Derrick, piledriver, rock cutter, concrete mixing plant, mechanical bank grader barges, other bank revetment barges; and powerplant, barges, only.
1940 [12]	Small Craft	
1945 P	Pontoons and floating docks	Includes: BuDock type pontoons only.
1950	Floating dry docks	
1990 P	Miscellaneous vessels	Includes: Commercial sailing vessels only.

Federal supply class code	Commodity	Content
	SHIPS, SMALL CRAFT, AND RELATED MARINE EQUIPMENT	
2010	Ship and boat propulsion components.	
2020	Rigging and rigging gear.	
2030	Deck machinery.	
2040	Marine hardware and hull. Items.	
2060	Commercial fishing equipment.	
2090	Miscellaneous ship and marine equipment.	
2805 P	Gasoline reciprocating engines, except aircraft, and components.	Includes: Gasoline engines for use aboard ships herein assigned, only.
2815 P	Diesel engines and components.	Excludes: Outboard, motors, gasoline. Includes: Engines and components for use aboard ships herein assigned only.
2820 P	Steam engines, reciprocating, and components.	Includes: Marine main propulsion steam engines only.
2825 P	Steam turbines and components.	Includes: Marine steam turbines only.
3950 P	Winches, hoists, cranes, and derricks.	Includes: Equipment for use aboard ships herein assigned only:
4010 P	Chain and wire rope.	Includes: Anchor chain; and anchor chains (shots, no attachments) for use aboard ships herein assigned only.
4110 P	Self-contained refrigeration units and accessories.	Includes: Units and accessories for use aboard ships only.
4120 P	Self-contained air conditioning units and accessories.	Includes: Units and accessories for use aboard ships herein assigned only.
4130 P	Refrigeration and air conditioning plants and components.	Includes: Plants and components for use aboard ships herein assigned only.
4140 P	Fans and air circulators, non-industrial.	Includes: Fans and air circulators for use aboard ships herein assigned only.
4220 P	Marine lifesaving and diving equipment.	Includes: Diving equipment only.
4310 P	Compressors and vacuum pumps.	Includes: Reciprocating air compressors; and rotary air compressors for use aboard ships herein assigned only.
4320 P	Power and hand pumps.	Includes: Power driven pumps; and air ejector assemblies for use aboard ships herein assigned only.
4330 P	Centrifugals, separators, and pressure and vacuum filters.	Includes: Oil purifiers; and oil filters, for use aboard ships herein assigned only.
4410 P	Industrial boilers.	Includes: Boilers for use aboard ships herein assigned only.
4420 P	Heat exchangers and steam condensers.	Includes: Heat exchangers for use aboard ships herein assigned only.
4450 P	Industrial fan and blower equipment.	Includes: Equipment for use aboard ships herein assigned only.
4510 P	Plumbing fixtures and accessories.	Includes: Troughs, wash (personnel); troughs, water closet; and troughs, urinal; for use aboard ships herein assigned only.
4620 P	Water distillation equipment, marine and industrial.	Includes: Distilling plants for use aboard ships herein assigned only.
5430 P	Storage tanks.	Includes: Tanks, metal (enclosure only, not part of ship's structure), for use aboard ships herein assigned only.
5670 P	Architectural and related metal products.	Includes: Gratings and floors, metal (does not include deck structure) for use aboard ships herein assigned only.
5985 P	Antennae, waveguides, and related equipment.	Includes: Antenna poles; and masts, antenna for use aboard ships herein assigned only.
6105 P	Motors, electrical.	Includes: Motors for use aboard ships herein assigned only.
6115 P	Generators and generator sets.	Includes: Gasoline, diesel and steam engine-generator sets; generators, electric; and steam turbine-generator sets for use aboard ships herein assigned only.
6125 P	Converters, electrical.	Includes: Motor-generator sets for use aboard ships herein assigned only.
6220 P	Electric vehicular lights and fixtures.	Includes: Fixed lights for use aboard ships herein assigned only.
6320 P	Shipboard alarm and signal systems.	Includes: Alarm systems: fire alarm systems; indicating systems; telegraph systems (signals and signaling) (less electronic type) for use aboard ships herein assigned only.
6605 P	Navigational instruments.	Includes: Hand leads (soundings); lead reels; sounding machines; stands, pelorus, for use aboard ships herein assigned only.
6650 P	Optical instruments.	Includes: Stands, telescope, for use aboard ships herein assigned only.
6665 P	Hazard-detecting instruments and apparatus.	Includes: Hazard-determining safety devices, for use aboard ships herein assigned only.
8140 P	Ammunition boxes, packages, and special containers.	Includes: Boxes, ammunition, for use aboard ships herein assigned only.
8345 P	Flags and pennants.	Includes: Boxes, signal flag, for use aboard ships herein assigned only.

See footnotes at end of § 5.1201–3.

Federal supply class code	Commodity	Content
	SHIPS, SMALL CRAFT, AND RELATED MARINE EQUIPMENT—Continued	
6645 P [5]	Time measuring instruments.	Includes: All clocks, chronometers, and spare parts thereof, as follows: alarm clocks; boat clocks; cans, chronometer shipping and storage; carrying cases, chronometer; carrying cases, make-break circuit, chronometer; cases, chronometer, gimbal; cases, chronometer, padded; chronometers; chronometers, make-break-circuit; clocks, direct reading; clocks, electric; clocks, floor; clocks, interval timer; clocks, marine, mechanical; clocks, master control clocks, master program; clocks, master regulating; clocks, mechanical; clocks, message center; clocks, nurses'; clocks, program; clocks, shelf; clocks, wall; clocks, watchmen's; clock motors; clock movements, electric; deck clocks; dials, clock; hour-meters; interval timers; keys, clock, mariner clocks; meters engine running time; meters, hour recording; meters, time totalizing, electric; program control instruments; program timers; stop clocks; time period counters; timers, bombing; timers, engine hour; timers, sequential; timers, stop.
	WEAPONS, FIRE CONTROL EQUIPMENT, AMMUNITION AND EXPLOSIVES [5]	
1095 P	Miscellaneous weapons.	Includes: Guns, line throwing only.
1310 P	Ammunition, over 30-mm up to 75mm.	Includes: 40-mm ammunition only.
1325 P [13]	Bombs.	Includes: Armor-piercing; depth bombs, externally suspended low drag bombs; and components and practice bombs therefor, as listed in Ord Pamphlet 1280 and OP 988.
1340 P [14]	Rockets and rocket ammunition.	Includes: 2.25 in. Rocket SCAR, Practice; Heads Mk 3 and Mods; Motors Mk 15 and Mods; Mk 16 and Mods. 2.75 Inc. Rocket FFAR, service and practice; Heads Mk 1 and Mods (General Purpose); Mk 5 and Mods (HEAT); Motors Mk 1 and Mods; Mk 2 and Mods; Mk 3 and Mods. 5 In. Rocket HVAR, service and practice; Heads Mk 2 and Mods (Common) Mk 6 and Mods (GP); Mk 4 and Mods (smoke) Mk 25 and Mods (ATAR); Motors Mk 10 and Mods. 5 In. Rocket FFAR service and practice; Heads Mk 24 and Mods (General Purpose); Mk 32 and Mods (Shaped Charged); Mk 26 and Mods (illum); Motors Mk 16 and Mods. Excludes: Rockets included under above assignment to the Army.
1390 P	Fuzes and primers.	Includes: Fuzes and Primers for Navy assigned ammunition and V.T. fuzes, rotating type, only.
4925 P	Ammunition maintenance and repair shop specialized equipment.	Includes: Sets, kits, and outfits of explosive Ordnance tools and equipment as defined in OPNAV 8027.1B, AR 755–1300–6; AFR 136–8 and further, as described in Ord Pamphlet 1851(C) and other similar documents of other services. Excludes: All others not included above.
8140 P	Ammunition boxes, packages, and special containers.	Includes: Boxes, packages and containers for 40-mm ammunition, only.

§ 5.1201–3 Department of the Air Force.

Federal supply class code	Commodity	Content
	ELECTRICAL AND ELECTRONIC COMPONENTS	
5960 P	Electron tubes, transistors, and rectifying crystals.	Includes: Only gas filled or evacuated electronic tubes which a common coordinated dpecification as set forth in MIL-E/1D and which are common to two or more Military Departments.
	ELECTRONIC EQUIPMENT [3] FIRE FIGHTING, RESCUE AND SAFETY EQUIPMENT (AIRPORT)	
2320 P	Trucks and truck-tractors.	Includes: Airport crash rescue vehicles only.
2330 P	Trailers.	Includes: Airport crash rescue trailer units only.
4210 P	Fire fighting equipment.	Includes: Airport crash fire fighting vehicles only.

Federal supply class code	Commodity	Content
	LIGHTING FIXTURES, AIRPORT	
6210 P	Indoor and outdoor electric lighting fixtures.	Includes: Fixtures for airport lighting, alarm and signal systems only.
	PHOTOGRAPHIC EQUIPMENT [15]	
6710 P	Cameras, motion picture	Excludes: Submarine periscope and underwater cameras.
6720 P	Cameras, still picture	Excludes: Submarine periscope and underwater cameras.
6730 P	Photographic projection equipment	Excludes: 35 mm theatre projectors.
6740	Photographic developing and finishing equipment.	
6750 P	Photographic supplies	Excludes: Photoflash lamps, which are mandatory for purchase under the provisions of Federal Supply Schedule Class 62, Part II, Electric Lamps.
6760	Photographic equipment and accessories.	
6780	Photographic sets, kits, and outfits:	

[1] The implementing procedure for this DOD Procurement Assignment also covers selected mechanical smoke generators, which are classified under FSC Class 1040 Chemical Weapons and Equipment. The entire FSC Class 1040 is under DOD Procurement Assignment to the Department of the Army.

[2] Each Department is assigned procurement responsibility for those items which the Department either designed or sponsored development, as listed in JANAP 140 and Supplemental Departmental Listings.

[3] This listing has been modified to reflect the addition of selected paper cutlery and flatware and paper tableware formerly included in the Paper and Paper Products assignment.

[4] Navy and Marine Corps requirements for Box, Crate, and Package Shook are excluded from this assignment.

[5] The following items in FSC 6645 are not assigned: chronographs; clocks, job recorder; job recording devices, racks, timecard; recorders, payroll time; recorders, time; recorders, watch movement; stamps, time; stations, watchmen's clock; time recorders; and time stamps.

[6] For purposes of procurement, Naval Ordnance comprises all arms, armor, and armament for the Department of the Navy and includes all offensive and defensive weapons, together with their components, controlling devices and ammunition used in executing the Navy's mission in National Defense (except small arms and those items of aviation ordnance procured from the Army).

[7] Requirements of commercial tires and tubes, when the item to be procured is less than $10,000 per line item (for tires costing less than $1,000 per tire) or when the item to be procured is less than $25,000 per line item (for tires costing $1,000 or more per tire), shall be purchased in accordance with the mandatory provisions of Federal Supply Class 26 Part II, Tires and Tubes, Pneumatic (except aircraft). These mandatory provisions do not apply to Military tires and tubes over the above specified dollar amounts in accordance with the procedures implementing this DOD procurement assignment. This DOD procurement assignment does not include FSC Class 2620, Tires and Tubes, Pneumatic, Aircraft. These items are mandatory for purchase in accordance with the provisions of Federal Supply Class 26—Part I, Tires and Tubes, Pneumatic, Aircraft.

[8] The Department of the Army portion of this DOD procurement assignment is covered by two sets of implementing procedures. One set covers items under the cognizance of the Army Ordnance Corps and the other covers items under the cognizance of the Army Chemical Corps.

[9] Mechanical smoke generators included in this FSC Class are covered in the implementing procedures for Chemical Warfare Equipment and Supplies.

[10] Army responsible for loading, assembling and packing toxicological smoke and incendiary shells.

[11] The implementing procedures for this DOD Procurement Assignment also cover airborne and shipborne pneumatic lifeboats, which are classified under FSC Class 1940—Small Craft. The entire FSC Class 1940 is under DOD Procurement Assignment to the Department of the Navy.

[12] Airborne and shipborne pneumatic lifeboats included in this FSC Class are covered in the implementing procedures for Lifesaving Equipment, Marine.

[13] Army responsible for loading, assembling and packing toxicological, smoke, and incendiary shells. Loading, assembling, and packing in excess of Navy owned capacity to be done by Army.

[14] Filler and filling of all smoke and toxicological rockets are assigned to the Army.

[15] Excludes photographic equipment controlled by the Congressional Joint Committee on Printing and Micro-Film Equipment and Supplies.

PART 6—FOREIGN PURCHASES

Sec.
6.000 Scope of part.

Subpart A—Buy American Act—Supply and Service Contracts

6.100 Scope of subpart.
6.101 Definitions.
6.102 Statutory requirements.
6.103 Exceptions.
6.103–1 Use outside the United States.
6.103–2 Nonavailability in the United States.
6.103–3 Unreasonable cost or inconsistency with the public interest.
6.103–4 Scrap.
6.103–5 Canadian supplies.
6.103–6 Panamanian supplies for use in the Canal Zone.
6.104 Procedures.
6.104–1 Applicability.
6.104–2 Solicitation of bids and proposals.
6.104–3 Certificate.
6.104–4 Evaluation of bids and proposals.
6.104–5 Contract clause.
6.104–6 Contract administration.
6.105 List of excepted articles, materials, and supplies.

Subpart B—Buy American Act—Construction Contracts

6.200 Scope of subpart.
6.201 Definitions.
6.201–1 Construction.
6.201–2 Construction materials.
6.201–3 Components.
6.201–4 United States.
6.201–5 Domestic construction material.
6.201–6 Nondomestic construction material.
6.202 Statutory requirements.
6.203 Exceptions.
6.203–1 Nonavailability in the United States.
6.203–2 Unreasonable costs or impracticability.
6.203–3 Panamanian materials for use in the Canal Zone.
6.204 Procedures.
6.204–1 Applicability.
6.204–2 Solicitation of bids and proposals.
6.204–3 Evaluation of bids and proposals.
6.204–4 Contract listing of excepted nondomestic construction materials.
6.204–5 Contract clause.
6.204–6 Canal Zone contracts.
6.205 Penalty for violation.
6.206 List of excepted articles, materials, and supplies.

Subpart C—Appropriation Act Restrictions on Procurement of Foreign Supplies

6.300 Scope of subpart.
6.301 Definition.
6.302 Restriction.
6.303 Exceptions.
6.304 Procedures.
6.304–1 Procurement of food, clothing, spun silk yarn for cartridge cloth, or items containing mohair or cotton.
6.304–2 Procurement of items containing wool (except mohair).
6.305 Contract clause.

Subpart D—Purchases From Soviet-Controlled Areas

6.401 Restrictions.
6.401–1 General policy.
6.401–2 Soviet-controlled areas.
6.401–3 Certain supplies of foreign origin.
6.401–4 Certain supplies from Hong Kong, Macao, and Soviet-controlled areas.
6.401–5 Supplies from North Korea or China.
6.402 Exceptions.
6.403 Contract clause.

Subpart E—Canadian Purchases

6.501 Purchases from Canadian suppliers.
6.502 Guarantee by Canadian Government.
6.503 Agreement with Department of Defence Production (Canada).
6.504 Mutual Canadian-American interests.

Subpart F—Duty and Customs

6.601 Customs duties on foreign purchases.
6.602 Emergency purchases of war material abroad.
6.602–1 General.
6.602–2 War materials.
6.602–3 Emergency purchases.
6.602–4 Use of duty-free entry certificates.
6.602–5 Limitations.
6.602–6 Duty-free entry certificate.
6.603 Supplies for vessels or aircraft operated by the United States.
6.604 Customs duties and drawbacks.
6.605 Duty-free entry of listed Canadian supplies.
6.605–1 Policy.
6.605–2 Contract clause.
6.605–3 Listed supplies for unlisted end items.
6.605–4 Amending existing contracts.

Subpart G—Mutual Security Act Procurements

6.701 Exemption from examination of records requirement.
6.701–1 General.
6.701–2 Contracts with foreign governments.
6.701–3 Contracts with other foreign contractors.

AUTHORITY: §§ 6.000 to 6.701–3 issued under R.S. 161, sec. 2202, 70A Stat. 120; 5 U.S.C. 22, 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314.

§ 6.000 Scope of part.

This part deals with (a) restrictions upon the procurement, or the use in construction, of supplies originating in foreign countries, (b) purchases from Soviet-controlled countries or areas, (c) purchases from Canadian sources, (d) duty and customs, and (e) certain Mutual Security Act procurements.

Subpart A—Buy American Act—Supply and Service Contracts

§ 6.100 Scope of subpart.

This subpart implements the Buy American Act (41 U.S.C. 10a-d) and the policies set forth in Executive Order 10582, dated 17 December 1954, with respect to supply and service contracts.

§ 6.101 Definitions.

As used in this subpart, the following terms have the meanings set forth below.

(a) "End products" means articles, materials, and supplies, which are to be acquired for public use. As to a given contract, the end products are the items to be delivered to the Government, as specified in the contract, including supplies to be acquired by the Government for public use in connection with service contracts.

(b) "Components" means those articles, materials, and supplies, which are directly incorporated in end products.

(c) "United States" means the States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, the Virgin Islands, Guam, and any other areas subject to the complete sovereignty of the United States.

(d) "Domestic source end product" means an unmanufactured end product which has been mined or produced in the United States, or an end product manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50% of the cost of all its components. A component shall be considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind (1) determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or (2) as to which the Secretary concerned has determined that it would be inconsistent with the public interest to apply the restrictions of the act.

(e) "Canadian end product" means an unmanufactured end product mined or produced in Canada, or an end product manufactured in Canada if the cost of its components which are mined, produced, or manufactured in Canada or the United States exceeds 50 percent of the cost of all its components.

(f) "Foreign end product" means an end product other than a domestic source end product.

(g) "Domestic bid" means a bid or offered price for a domestic source end product, including transportation to destination.

(h) "Foreign bid" means a bid or offered price for a foreign end product, including transportation to destination and duty (whether or not a duty-free entry certificate may be issued).

§ 6.102 Statutory requirements.

Except as provided in § 6.103, the Buy American Act requires that in the procurement of supplies and services, only domestic source end products shall be acquired for public use. In determining whether an end product is a domestic source end product, only the end product and its components shall be considered.

§ 6.103 Exceptions.

§ 6.103–1 Use outside the United States.

The restrictions of the Buy American Act do not apply to articles, materials, or supplies for use outside the United States.

§ 6.103–2 Nonavailability in the United States.

The Buy American Act does not apply to articles, materials, or supplies of a class or kind which the Government has determined are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. See § 6.105.

§ 6.103–3 Unreasonable cost or inconsistency with the public interest.

The restrictions of the Buy American Act do not apply when it is determined by the Secretary concerned that the cost of a domestic source end product would be unreasonable or that its acquisition would be inconsistent with the public interest. Such determinations shall be made in accordance with § 6.104–4.

§ 6.103–4 Scrap.

Scrap generated in, collected in, and prepared for processing in the United States shall be considered as of domestic origin.

§ 6.103–5 Canadian supplies.

(a) *Listed.* The Secretaries of the Departments have determined that it would be inconsistent with the public interest to apply the restrictions of the Buy American Act with respect to certain supplies, which have been determined to be of a military character or involved in programs of mutual interest to the United States and Canada, where such supplies are mined, produced, or manufactured in Canada and either (1) are Canadian end products or (2) are incorporated in end products manufactured in the United States. Each Department maintains a list of these supplies, which is approved by the Secretary concerned. (The Departmental lists provide that end equipment parts for listed supplies are considered to be included in the lists, even though not separately listed, when they are procured under a contract that also calls for listed supplies.)

(b) *Not listed.* The Secretaries of the Departments have also determined that it would be inconsistent with the public interest to apply the restrictions of the Buy Amercian Act (1) to the acquisition of any unlisted Canadian end product that is offered by a bid or proposal which is the lowest acceptable bid or proposal after any applicable duty (whether or not a duty-free entry certificate may be issued) is included for evaluation purposes, and (2) with respect to any supplies mined, produced, or manufactured in Canada that are incorporated in end products manufactured in the United States.

(c) *Application of Canadian exception.* The effect of paragraphs (a) and (b) of this section may be summarized as follows:

(1) As to any end product that is manufactured in the United States, all Canadian components are treated as components mined, produced, or manufactured in the United States for the purpose of determining whether the end product is a domestic source end product.

(2) Listed Canadian end products are treated as domestic source end products and neither duty nor the evaluation factors prescribed by § 6.104–4 shall be used for evaluation.

(3) Unlisted Canadian end products are evaluated by including any applicable duty, whether or not a duty-free entry certificate may be issued.

(d) *Limitations.* The above exceptions from the provisions of the Buy American Act which are applicable solely with respect to Canadian supplies, and the special procedures relating thereto which are set forth in this subpart, do not apply to, or affect determinations made with respect to (1) items contained in the list set forth in § 6.105 or (2) the purchase of supplies for civil works acquired with funds appropriated for Civil Functions, Department of the Army.

§ 6.103–6 Panamanian supplies for use in the Canal Zone.

In accordance with the Memorandum of Understandings ancillary to the Treaty with the Republic of Panama signed January 25, 1955, the Secretaries have determined that it would be inconsistent with the public interest to apply the restrictions of the Buy American Act to articles, materials, or supplies that are mined, produced, or manufactured in Panama and are purchased for use in the Canal Zone.

§ 6.104 Procedures.

§ 6.104–1 Applicability.

The following procedures apply to all contracts involving the procurement of supplies except contracts exclusively for articles, materials, or supplies, for use outside the United States (but see § 6.103–5(a)).

§ 6.104–2 Solicitation of bids and proposals.

Invitations for Bids and Requests for Proposals shall state that specific information as to articles, materials, and supplies excepted from the Buy American Act (see § 6.105) is available to prospective contractors upon request.

§ 6.104–3 Certificate.

Invitations for Bids and Requests for Proposals shall require that each bid or proposal include a certificate substantially as follows:

BUY AMERICAN CERTIFICATE

The bidder or offeror hereby certifies that each end product, except the end products

excluded below, is a domestic source end product (as defined in the contract clause entitled Buy American Act); and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

Excluded items: ----------

§ 6.104–4 Evaluation of bids and proposals.

(a) In accordance with the Buy American Act, the Secretaries of the Departments have determined that where the following procedures result in the acquisition of foreign end products, the acquisition of domestic source end products would be (1) unreasonable in cost or (2) inconsistent with the public interest (see §§ 6.103–3 and 6.103–5).

(b) Except as provided in paragraph (d) of this section, bids and proposals shall be evaluated so as to give preference to domestic bids. For the purpose of evaluation, a factor of 6 percent of each foreign bid (which does not offer a Canadian end product) shall be added to that foreign bid, except that where the firm submitting the low acceptable domestic bid is a small business concern, or a labor surplus area concern, or both—

(1) The proposed award shall be submitted to the Secretary if required pursuant to paragraph (c) of this section, or

(2) If not required to be submitted under paragraph (c) of this section then a factor of 12 percent (in lieu of the 6 percent factor) of each such foreign bid shall be added to that foreign bid, except that where small purchase procedures (see Part 3, Subpart F of this Subchapter) are used the 6 percent factor shall apply.

Except for those cases forwarded to the Secretary pursuant to paragraph (c) of this section, award shall be made to the low acceptable bidder. When more than one line item is offered in response to an invitation for bids or request for proposals, the appropriate factor shall be applied on an item-by-item basis, except that the factor may be applied to any group of items as to which the invitation for bids or request for proposals specifically provides that award may be made on a particular group of items.

(c)(1) Notwithstanding that the low acceptable bid or proposal as to any item or group of items under paragraph (b) of this section may be a foreign bid, proposed awards shall be submitted, in accordance with Departmental procedures, to the Secretary concerned for decision where all acceptable domestic bids exceed the low acceptable foreign bid plus 6 percent (determined in accordance with paragraph (b) of this section) and the sum of any low acceptable domestic bid from any single (i) small business concern or (ii) labor surplus area concerned, exceeds $100,000: *Provided,* That this subparagraph shall not apply where the low foreign bid offers a Canadian end product.

(2) Proposed awards shall be submitted, in accordance with Departmental procedures, to the Secretary concerned for decision where:

(i) Rejection of an acceptable low foreign bid is considered necessary to protect essential national security interests, such as maintenance of a mobilization base; or

(ii) Rejection of any bid or proposal for other reasons of the national interest is considered necessary.

Prior to final action, cases within this subparagraph (2) shall be referred by the Secretary concerned to the Assistant Secretary of Defense (Supply and Logistics).

(d)(1) Bids offering Canadian end products on the lists described in § 6.103–5(a) shall be evaluated on a parity with domestic bids, i.e., neither a price differential nor duty shall be added.

(2) Bids offering Canadian end products of the type described in § 6.103–5(b) shall be evaluated on a parity with domestic bids (whether or not a duty-free entry certificate may be issued) except that any applicable duty shall be added.

§ 6.104–5 Contract clause.

The clause set forth below shall be inserted in all contracts for supplies and, when applicable, in contracts for services; except that it need not be inserted in contracts exclusively for articles, materials, or supplies for use outside the United States.

BUY AMERICAN ACT (JULY 1960)

(a) In acquiring end products, the Buy American Act (41 U.S.C. 10a–d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) "components" means those articles, materials, and supplies, which are directly incorporated in the end products;

(ii) "end products" means those articles, materials, and supplies, which are to be acquired under this contract for public use; and

(iii) a "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States or Canada exceeds 50 percent of the cost of all its components. For the purposes of this (a)(iii)(B), components of foreign origin of the same type or kind as the products referred to in (b)(ii) or (iii) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products:

(i) which are for use outside the United States;

(ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) as to which the Secretary determines the domestic preference to be inconsistent with the public interest; or

(iv) as to which the Secretary determines the cost to the Government to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954.)

In contracts for civil works acquired with funds appropriated for Civil Functions, Department of the Army, delete the words "or Canada" in paragraph (a)(iii)(B) of the clause in this section.

§ 6.104–6 Contract administration.

In appropriate cases, the contracting officer should advise the contractor of the effect of exceptions to the Buy American Act on the contractor's obligations under the clause required by § 6.104–5. For example, in furtherance of mutual Canadian-American interests as described in § 6.504, the contracting officer may advise the contractor that all components of Canadian manufacture will be treated as manufactured in the United States for purposes of the Buy American Act clause.

§ 6.105 List of excepted articles, materials, and supplies.

Pursuant to the Buy American Act and §§ 6.103–2 and 6.103–3, the Secretaries have determined that the articles, materials, and supplies listed below may be acquired for public use without regard to country of origin, except as provided in Subpart D of this part. Additional determinations pursuant to 6.103–2 covering individual procurements may be made in accordance with Departmental procedures.

List of Excepted Articles, Materials, and Supplies

Acetylene, black.
Agar, bulk.
Antimony, as metal or oxide.
Asbestos, amosite.
Bananas.
Beef extract.
Bismuth.
Books, trade, text, technical or scientific; newspapers; magazines; periodicals; printed briefs and films; not printed in the United States and for which domestic editions are not available.
Brazil nuts.
Cadmium, ores and flue dust.
Calcium cyanamide.
Capers.
Cashew nuts.
Castor beans.
Chalk, English.
Chicle.
Chrome ore or chromite.
Cinchona bark.
Cobalt, in cathodes, rondelles, or other primary forms.
Cocoa beans.
Coconut and coconut meat in shredded, desiccated or similarly prepared form.
Coffee, raw or green bean.
Copra.
Cork, wood or bark and waste.
Damar gum.
Diamonds, industrial.
Emetine, bulk.
Ergot, crude.
Fiber, coir, abaca, and agave.
Goat and kid skins.
Graphite, natural, crystalline, crucible grade.
Hog bristles for brushes.
Hyoscine, bulk.
Iodine, crude.
Ipecac, root.
Jute and jute burlaps.
Kaurigum.
Lac.
Logs, veneer, and lumber from Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.
Menthol, natural, bulk.
Mica.
Nickel, primary, in ingots, pigs, shot, cathodes, or similar forms; nickel oxide and nickel salts.
Nitroguanidine (also known as picrite).
Nux vomica, crude.
Oiticica oil.
Olive oil.
Olives, green; plain (unpitted) and stuffed, bulk.

Opium, crude.
*Petroleum, crude oil; petroleum, finished products; and petroleum, unfinished oils.
Platinum and platinum group metals refined, as sponge, powder, ingots, or cast bars.
Pyrethrum flowers.
Quartz crystals.
Quebracho.
Quinidine.
Radium salts.
Rubber, crude and latex.
Rutile.
Santonin, crude.
Shellac.
Silk, unmanufactured.
Sperm oil.
Spices and herbs.
Talc, block, steatite.
Tapioca, tapioca flour and cassava.
Tartar, crude, tartaric acid and cream of tartar.
Tea.
Tin, in bars, blocks, and pigs.
Vanilla beans.
Wax, carnauba.

Subpart B—Buy American Act—Construction Contracts

§ 6.200 Scope of subpart.

This subpart implements the Buy American Act (41 U. S. Code 10 a–d) and the policies set forth in Executive Order 10582, dated 17 December 1954, with respect to construction contracts.

§ 6.201 Definitions.

As used in this subpart, the following terms have the meanings set forth below.

§ 6.201–1 Construction.

"Construction" means construction, alteration, or repair of any public building or public work in the United States.

§ 6.201–2 Construction materials.

"Construction materials" means articles, materials, and supplies, which are brought to the construction site for incorporation in the building or work.

§ 6.201–3 Components.

"Components" means those articles, materials, and supplies, which are directly incorporated in construction materials.

§ 6.201–4 United States.

United States means the States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, the Virgin Islands, Guam, and any other areas subject to the complete sovereignty of the United States.

§ 6.201–5 Domestic construction material.

"Domestic construction material" means an unmanufactured construction material which has been mined or produced in the United States, or a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. A component shall be considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the construction material in which it is incorporated is manufactured in the United States and the component is of a class or kind determined by the Department concerned to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

§ 6.201–6 Nondomestic construction material.

"Nondomestic construction material" means a construction material other than a domestic construction material.

§ 6.202 Statutory requirements.

Except as provided in § 6.203, the Buy American Act requires that in the performance of contracts for construction, only domestic construction materials shall be used. In determining whether a construction material is a domestic construction material, only the construction material and its components shall be considered.

§ 6.203 Exceptions.

§ 6.203–1 Nonavailability in the United States.

The Buy American Act does not apply to articles, materials, or supplies of a class or kind which the Department concerned has determined are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. See § 6.206.

§ 6.203–2 Unreasonable costs or impracticability.

The restrictions of the Buy American Act do not apply when it is determined by the Secretary concerned that the use of a particular domestic construction material would (a) unreasonably increase the cost, or (b) be impracticable. Such determinations shall be made in accordance with § 6.204–3.

§ 6.203–3 Panamanian materials for use in the Canal Zone.

In accordance with the Memorandum of Understandings ancillary to the Treaty with the Republic of Panama signed January 25, 1955, articles, materials, and supplies that are mined, produced, or manufactured in Panama and are purchased for use in the Canal Zone are excepted from the Buy American Act.

§ 6.204 Procedures.

§ 6.204–1 Applicability.

The following procedures apply to all contracts for construction in the United States only.

§ 6.204–2 Solicitation of bids and proposals.

Invitations for Bids and Requests for Proposals for construction shall include the following provision:

INFORMATION REGARDING BUY AMERICAN ACT

(a) Pursuant to the Buy American Act (41 U. S. Code 10 a–d), it is generally required that only domestic construction materials will be used in the performance of the contract. See clause ---- of the General Provisions, entitled Buy American Act. This requirement does not apply to construction materials, or their components, included either in the list set forth in 6.206 of this Regulation or set forth below:

(Insert list here.)

(b) Additional exceptions are permitted if the Government determines as to particular construction materials that the requirement would be impracticable or would unreasonably increase the cost. Therefore, bids or proposals proposing the use of nondomestic construction materials (other than those referred to in paragraph (a) above) may be eligible for award if such nondomestic construction materials are specifically designated in the bid or proposal and if accompanied by data demonstrating that, as to each such designated nondomestic construction material, use of any corresponding domestic construction material would be impracticable or would unreasonably increase the cost. If the Government determines that an exception from the Buy American Act should be made, an exception for the particular construction materials designated will be noted in the contract and the findings which justified the exception may be inspected upon request.

(c) To show that the use of a particular domestic construction material would unreasonably increase the cost, accompanying data must show that the cost of any available acceptable domestic construction material, delivered at the construction site, would exceed by more than six percent (6 percent) the cost of the designated nondomestic construction material delivered at the construction site (including any applicable duty). The accompanying data shall reflect a thorough canvass of dealers and suppliers handling the construction materials involved.

§ 6.204–3 Evaluation of bids and proposals.

(a) *Determinations.* In accordance with the Buy American Act, the Secre-

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*Petroleum definitions, as used in this Subpart. (a) Crude oil means crude petroleum as it is produced at the wellhead;

(b) Finished products means any one or more of the following petroleum oils, or a mixture or combination of such oils, which are to be used without further processing except blending by mechanical means:

(i) Liquefied gases—hydrocarbon gases recovered from natural gas or produced from petroleum refining and kept under pressure to maintain a liquid state at ambient temperatures;

(ii) Gasoline—a refined petroleum distillate which by its composition, is suitable for use as a carburant in internal combustion engines;

(iii) Jet fuel—a refined petroleum distillate used to fuel jet propulsion engines;

(iv) Naphtha—a refined petroleum distillate falling within a distillation range overlapping the higher gasoline and the lower kerosenes;

(v) Fuel oil—a liquid or liquefied petroleum product burned for lighting or for the generation of heat or power and derived directly or indirectly from crude oil, such as kerosene, range oil, distillate fuel oils, gas oil, diesel fuel, topped crude oil, residues;

(vi) Lubricating oil—a refined petroleum distillate or specially treated petroleum residue used to lessen friction between surfaces;

(vii) Residual fuel oil—a topped crude oil or viscous residuum which, as obtained in refining or after blending with other fuel oil, meets or is the equivalent of Military Specification Mil–F–859 for Navy Special Fuel Oil and any other more viscous fuel oil, such as No. 5 or Bunker C;

(viii) Asphalt—a solid or semi-solid cementitious material which gradually liquefies when heated, in which the predominating constituents are bitumins, and which is obtained in refining crude oil.

(c) Unfinished oils means one or more of the petroleum oils listed in (b) above, or a mixture or combination of such oils, which are to be further processed other than by blending by mechanical means.

taries have determined that where the procedures set forth in paragraph (b) of this section result in the use of nondomestic construction materials, the use of domestic construction materials would unreasonably increase the cost. (See § 6.203–2.)

(b) *Unreasonable cost.* If a bid or proposal is submitted in accordance with paragraph (b) of the provision set forth in § 6.204–2 and if such bid or proposal would be the low acceptable bid or proposal but for the Buy American Act, award will be made on such bid or proposal if all the following conditions are satisfied:

(1) The bid or proposal specifically designates the nondomestic construction materials (not listed as exceptions in the Invitation for Bids or Request for Proposals) proposed for use;

(2) As to each such nondomestic construction material, accompanying data show that the cost of any available acceptable domestic construction material, delivered at the construction site, would exceed by more than 6 percent the cost of the designated nondomestic construction material delivered at the construction site (including any applicable duty);

(3) As to each such nondomestic construction material, the contracting officer is satisfied that the showing required by subparagraph (2) of this paragraph is correct as of the date of the opening of bids or proposals; and

(4) The lowest acceptable bid or proposal using only domestic construction materials and construction materials excepted in § 6.206 or in the Invitation for Bids or Request for Proposals exceeds the bid or proposal designating nondomestic construction materials by more than 6 percent of the aggregate cost of the designated nondomestic construction materials delivered at the construction site (including any applicable duty).

(c) *Impracticability.* If a bid or proposal is submitted in accordance with paragraph (b) of the provisions set forth in § 6.204–2 and if such bid or proposal would be the low acceptable bid or proposal but for the Buy American Act, the proposed award shall be submitted, in accordance with Departmental procedures, to the Secretary concerned for decision, if the following conditions obtain:

(1) The bid or proposal specifically designates the nondomestic construction materials (not listed as exceptions in the Invitation for Bids or Request for Proposals) proposed for use; and

(2) As to each such nondomestic construction material, accompanying data show that it would be impracticable to use domestic construction materials.

§ 6.204–4 Contract listing of excepted nondomestic construction materials.

(a) The clause set forth below shall be included in all contracts for construction, and any articles, materials, and supplies which have been the subject of additional determinations pursuant to § 6.206 shall be listed thereunder.

NONDOMESTIC CONSTRUCTION MATERIALS

The requirements of the clause of this contract entitled Buy American Act do not apply to construction materials or their components either included in the list set forth in § 6.206 of 32 CFR or as set forth below:

(Insert list here.)

* * * * *

(b) If a contract is for award under § 6.204–3 and the use of designated nondomestic construction materials is to be permitted, the designated nondomestic construction materials shall be listed under the clause required by paragraph (a) of this section. As to each such nondomestic construction material, the contracting officer shall place in the contract file (1) a copy of the data and justification in the case of an exception under § 6.204–3 (b), or (2) a copy of the Secretarial finding of impracticability in the case of an exception under § 6.204–3 (c), and copies thereof will be available for public inspection.

§ 6.204–5 Contract clause.

The clause set forth below shall be inserted in all contracts for construction.

BUY AMERICAN ACT

(a) The Buy American Act (41 U. S. Code 10 a–d) provides that the Government give preference to construction materials which have been mined, produced, or manufactured in the United States. For the purpose of this clause:

(i) the term "construction materials" means articles, materials, and supplies, which are brought to the construction site for incorporation in the building or work;

(ii) the term "components" means those articles, materials, and supplies, which are directly incorporated in construction materials; and

(iii) the term "domestic construction material" means an unmanufactured construction material which has been mined or produced in the United States, or a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds fifty percent (50%) of the cost of all its components. A component shall be considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the construction material in which it is incorporated is manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(b) The Contractor agrees that there will be used in the performance of this contract only domestic construction materials, except as to particular construction materials which the Government has determined are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or which are noted in the clause of this contract entitled Nondomestic Construction Materials as being excepted from the Buy American Act.

§ 6.204–6 Canal Zone contracts.

In accordance with § 6.203–3, with respect to contracts for construction in the Canal Zone, the following will be inserted in (a) the space providing for listing excepted supplies following paragraph (a) of the provision in § 6.204–2 and (b) the space following the clause in § 6.204–4:

Panamanian Materials. Any construction material or component that is mined, produced, or manufactured in the Republic of Panama. (Any such component shall be considered to be a United States component for the purpose of the "Buy American Act" clause.) (JUL. 1960)

§ 6.205 Penalty for violation.

If the Secretary concerned finds that in the performance of a construction contract there has been a failure to comply with the clause required by § 6.204–5, he shall make public his findings, including therein the name of the contractor obligated under the contract, and no other contract for construction in the United States or elsewhere shall be awarded to such contractor, or to subcontractors, materialmen, or suppliers with which such contractor is associated or affiliated, within a period of three years after such finding is made public. (See Part 1, subpart F of this chapter.)

§ 6.206 List of excepted articles, materials, and supplies.

Pursuant to the Buy American Act and § 6.203–1, the Secretaries have determined that the articles, materials, and supplies listed below may be used in construction without regard to country of origin, except as provided in Subpart D of this part. Additional determinations pursuant to § 6.203 covering individual contracts for construction may be made in accordance with Departmental procedures.

Antimony, as metal or oxide.
Asbestos, amosite.
Bismuth.
Cadmium, ores and flue dust.
Chalk, English.
Chrome ore or chromite.
Cobalt, in cathodes, rondelles, or other primary forms.
Cork, wood or bark and waste.
Damar gum.
Graphite, natural, crystalline, crucible grade.
Jute and jute burlaps.
Kaurigum.
Lac.
Logs, veneer, and lumber from Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.
Mica.
Nickel, primary, in ingots, pigs, shot, cathodes, or similar forms; nickel oxide and nickel salts.
Rubber, crude and latex.
Shellac.
Tin, in bars, blocks, and pigs.

Subpart C—Appropriation Act Restrictions on Procurement of Foreign Supplies

§ 6.300 Scope of subpart.

This subpart implements the customary Defense Appropriation Act restriction on the availability of appropriated funds for the procurement of any article of food, clothing, cotton, wool, or spun silk yarn for cartridge cloth, as it has recurred in Defense Appropriation Acts for several years. However, reference should be made to the current Department of Defense Appropriation Act as a check on the current applicability of this Part. Nothing herein shall affect the applicability of the Buy American Act (see Subparts A and B of this part).

§ 6.301 Definition.

For the purpose of this part, the term "possessions", as used in the phrase "United States or its possessions", includes Puerto Rico.

§ 6.302 Restriction.

Except as provided in § 6.303, there shall not be procured supplies consisting in whole or in part of any food, clothing, cotton, wool, or spun silk yarn for cartridge cloth, which have not been grown or produced in the United States or its possessions; but this does not restrict the procurement of cotton or wool reprocessed or reused in the United States or its possessions or of foods manufactured or processed in the United States or its possessions.

§ 6.303 Exceptions.

The restriction of § 6.302 does not apply to the following:

(a) Procurements outside the United States in support of combat operations.

(b) Procurements by vessels in foreign waters.

(c) Emergency procurements or procurements of perishable foods by establishments located outside the United States for the personnel attached thereto.

(d) Procurements of supplies listed in § 6.105.

(e) Small purchases of items containing wool or cotton in amounts not exceeding $5,000. For the purposes of this exception, a small purchase in an amount not exceeding $5,000 shall mean a procurement action involving a total dollar amount not in excess of $5,000, as distinguished from a single line item.

(f) Procurements of end items incidentally incorporating cotton, or wool, of which the estimated value is not more than 10 percent of the total price of the end item, provided that the estimated value does not exceed $10,000 or 3 percent of the total price of the end item, whichever is greater.

(g) Any articles of food or clothing or any form of cotton, spun silk yarn for cartridge cloth, or wool, as to which the Secretary concerned has determined that a satisfactory quality and sufficient quantity grown or produced in the United States, or its possessions cannot be procured as and when needed at United States market prices.

§ 6.304 Procedures.

§ 6.304–1 Procurement of food, clothing, spun silk yarn for cartridge cloth, or items containing mohair or cotton.

In general, food, clothing (not covered by § 6.304–2), spun silk yarn for cartridge cloth, or any form of mohair or cotton, will be procured only if grown, reprocessed, reused, or produced in the United States or its possessions. However, if the contracting officer finds that prices for such domestic supplies are unreasonable, he may refer the matter to the Secretary concerned for determination with respect to § 6.303(g) in accordance with Departmental procedures.

§ 6.304–2 Procurement of items containing wool (except mohair).

(a) The Secretaries have determined that to the extent that application of the procedures in this section results in the procurement of any articles of wool (except mohair) not grown, reprocessed, reused, or produced in the United States or its possessions, a satisfactory quality and sufficient quantity of such articles grown, reprocessed, reused, or produced in the United States or its possessions cannot be procured as and when needed at United States market prices.

(b) Bids and proposals for supplies of which wool is a part will be solicited on the following alternative bases:

(1) Manufactured in the United States or its possessions from domestic wool;

(2) Manufactured in the United States or its possessions from foreign wool; and

(3) Manufactured in the United States or its possessions from a blend of (percent) domestic wool and (percent) foreign wool.

(c) Each Invitation for Bids and Requests for Proposals for supplies of which wool is a component part will contain the following additional clause:

Domestic Wool Preference

(a) It is Congressional policy that, in Department of Defense procurements, preference shall be given to wool grown, reprocessed, reused, or produced in the United States, its Territories, its possessions, or Puerto Rico, to the extent that articles containing such wool can be procured as and when needed at United States market prices.

(b) If, on the date of opening of bids or evaluation of proposals, the average market price of domestic wool of usable grades (as reported by grade and type in the four issues of the Department of Agriculture "Market News" immediately preceding the date of bid opening or evaluation of proposals) is not more than 10 percent above the average of the prices (for usable grades and types) which reflect the current incentive price established by the Secretary of Agriculture, award will be made only on bids or proposals offering domestically produced articles of which the wool component is 100 percent domestic wool, provided that such bids or proposals are considered reasonable and otherwise acceptable.

(c) If, on the date of opening of bids or evaluation of proposals, the average market price of domestic wool of usable grades (as reported by grade and type in the four issues of the Department of Agriculture "Market News" immediately preceding the date of bid opening or evaluation of proposals) is more than 10 per cent above the average of the prices (for usable grades and types) which reflect the current incentive price, or to the extent that the Government's requirement cannot be filled by awards based on paragraph (b) hereof, there will be added to each bid or proposal offering articles of which the wool component is 100 per cent foreign wool an evaluation factor of $_____ per yard or per item, and there will be added to each bid or proposal offering articles of which the wool component is a blend of domestic and foreign wool that part of the evaluation factor which is in direct proportion to the percentage of foreign wool to be used, and award will be made to the low acceptable bidder.

(d) For the purposes of (b) and (c) above, the average market price of domestic wool of usable grades shall be the average market price of the representative types and grades set forth in § 6.304–2 (f) within that one of the categories therein set forth which includes wool which would meet the specifications, and the average of the prices which reflect the current incentive price established by the Secretary of Agriculture shall be the average of the prices set forth in § 6.304–2 (f) for that category.

(e) While bids or proposals offering articles using foreign wool may be considered and evaluated, as stated above, all stages of manufacturing of wool (whether foreign or domestic) must be performed in the United States, its Territories, its possessions, or Puerto Rico, as required by the contract clause entitled "Preference for Certain Domestic Commodities." This requirement is satisfied as to wool noils, reprocessed or reused wool if the reprocessing (i. e., garnetting or combing) and ensuing manufacture is performed in the United States, its Territories, possessions, or Puerto Rico.

(f) The Secretary has determined that, to the extent that any foreign wool is used under an award made pursuant to paragraph (c) hereof, a satisfactory quality and sufficient quantity of domestic wool cannot be procured as and when needed at United States market prices.

The evaluation factor will be computed in accordance with paragraph (f) of this section, and the amount of the factor will be inserted in place of the blank in paragraph (c) of the above clause.

(d) If, on the date of opening of bids or evaluation of proposals, the average market price of domestic wool of usable grades is not more than 10 percent above the average of the prices of representative types and grades of domestic wools in the wool category which includes the wool required by the specifications (see paragraph (f) of this section), which prices reflect the current incentive price as established by the Secretary of Agriculture, and if reasonable bids or proposals have been received for the advertised quantity offering 100 percent domestic wools, the contract will be awarded for domestically produced articles using 100 percent domestic wools and the procedure set forth in paragraphs (e) and (f) of this section will be disregarded.

(e) In the evaluation of bids and proposals under this subpart, an evaluation factor computed in accordance with paragraph (f) of this section will be added to that portion of the offered price which represents foreign wool to be furnished or used in performance of the contract, and award will be made accordingly. In the event that tie bids or proposals result from such evaluation, award will be made to the offeror proposing to furnish or use the most domestic wool.

(f) The evaluation factor to be used under paragraph (e) of this section will be 10 percent of the average of the following prices of representative types and grades of domestic wools within that one of the following categories which includes the wool required by the specifications. (The following prices reflect the current incentive price of 62 cents per pound grease basis converted to grade and type clean basis.)

Representative Type and Grade	Price, clean basis (per pound)
GROUP 1—GRADES 60'S AND FINER	
Category 1—Staple, Average and Good French Combing (worsted type)	
The average of the following grades:	
Territory original bag wool, average and good French combing, 64's and finer	$1.7748
Graded territory and Texas wool, staple and good French combing, one-half blood, 60's/62's	1.6946
Graded Fleece Wool:	
Staple and good French combing, 64's and finer	1.7862
Staple and good French combing, one-half blood, 60's/62's	1.6259
Category 2—Short, Average and Good French Combing and Clothing (woolen type)	
The average of the following grades:	
Territory original bag wool, short, French combing and clothing, fine (64's, not to exceed 15 percent of 60's/62's)	1.5801
Graded territory and Texas wool, average and good French combing, one-half blood, 60's/62's	1.6145
Graded Fleece Wool:	
Average and good French combing, 64's and finer	$1.7061
Average and good French combing, one-half blood, 60's/62's	1.5343
GROUP 2—GRADES 50'S–60'S	
Category 3—Staple and Good French Combing (worsted)	
The average of the following grades:	
Graded territory and Texas wools:	
Staple and good French combing, three-eighths blood, 56's/58's	1.4656
Staple and good French combing, 50's/48's, one-quarter blood	1.3397
The average of the following grades:	
Graded Fleece Wool:	
Staple and good French combing, three-eighths blood, 56's/58's	1.3626
Staple and good French combing, 50's/48's, one-quarter blood	1.2710
Category 4—Average French Combing (woolen type)	
The average of the following grades:	
Graded Territory and Texas Wool:	
Average French combing, three-eighths blood, 56's/58's	1.3053
Average French combing, 50's/48's, one-quarter blood	1.2028
Graded Fleece Wool:	
Average French combing, three-eighths blood, 56's/58's	1.2137
Average French combing, 50's/48's, one-quarter blood	1.0878
GROUP 3—GRADES BELOW 50'S	
Category 5—Staple and Good French	
The average of the following grades:	
Graded Fleece Wool:	
Low one-quarter blood, 46's, 4 inches or more in length	1.1565
Common and braid, 44's/36's, 5 inches or more in length	1.0763

§ 6.305 Contract clause.

In accordance with the requirements of § 6.302, the clause set forth below shall be inserted in all contracts for supplies and when applicable, in contracts for services.

Preference for Certain Domestic Commodities

The Contractor agrees that there will be delivered under this contract only such articles of food, clothing, cotton, spun silk yarn for cartridge cloth, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) as have been grown, reprocessed, reused or produced in the United States, its Territories, its possessions, or Puerto Rico: *Provided*, That this clause shall have no effect to the extent that the Secretary has determined as to any such articles that a satisfactory quality and sufficient quantity cannot be procured as and when needed at United States market prices: *Provided further*, That nothing herein shall preclude the delivery of foods under this contract which have been manufactured or processed in the United States, its Territories, its possessions, or Puerto Rico.

Subpart D—Purchases From Soviet-Controlled Areas

§ 6.401 Restrictions.

§ 6.401–1 General policy.

It is the general policy of the Department of Defense that supplies originating from sources within Soviet-controlled areas shall not be acquired for public use, notwithstanding the provisions of any other subpart of this part, and that Government contractors and subcontractors shall not acquire for use in the performance of any Government contract or subcontract thereunder any supplies or services originating from Soviet-controlled areas.

§ 6.401–2 Soviet-controlled areas.

For the purpose of this subpart, Soviet-controlled areas are the following:

Albania.
Bulgaria.
China, excluding Taiwan (Formosa), but including Manchuria, Inner Mongolia, the provinces of Tsinghai and Sikang, Sinkiang, Tibet, the former Kwantung Leased Territory, the present Port Arthur Naval Base Area, and Liaoning Province.
Communist-controlled area of Viet Nam and Communist-controlled area of Laos.
Czechoslovakia.
East Germany (Soviet Zone of Germany and the Soviet Sector of Berlin).
Estonia.
Hungary.
Latvia.
Lithuania.
North Korea.
Outer Mongolia.
Poland and Danzig.
Rumania.
Union of Soviet Socialist Republics.

§ 6.401–3 Certain supplies of foreign origin.

The following supplies, if of foreign origin and however processed, shall be presumed to have originated from Soviet-controlled (Chinese) sources and shall not be acquired for public use unless (a) such supplies have been lawfully imported into the United States, its Territories, its possessions, or Puerto Rico, or (b) the supplies are acquired directly from the countries indicated:

Bamboo, split	None.
Braids, straw	Italy, Japan.
Bristles, hog, including such bristles in knots or other processed condition.	None.
Brushes, paint (including parts thereof), containing hog bristles, if any such bristle is more than 1½ inches in total length or more than 1¼ inches in length out of the ferrule.	None.
Eggs, poultry:	
Whole in the shell, other than chicken	None.
Whole, dried	None.
Albumen, dried	None.
Yolks, dried	None.
Floor coverings, grass and straw, including seagrass mats and squares.	Japan.
Fur skins:	
Goat and kid	Argentina, Ethiopia (including Eritrea), Iran, Iraq.
Kolinsky	Republic of Korea.
Weasel	Canada.
Garments, Chinese type	None.
Jade, stones, cut but not set and suitable for use in jewelry	None.
Menthol, natural and synthetic (other than racemic)	Brazil.
Silk, piece goods, tussah and muga	None.
Silk, tussah and muga	None.
Tea, Chinese type	Formosa.
Tung oil	Argentina, Brazil, Paraguay.
Walnuts	France, Iran, Italy, Turkey.

§ 6.401–4 Certain supplies from Hong Kong, Macao, and Soviet-controlled areas.

The following supplies, however processed, which are or were located in or transported from or through Hong Kong, Macao, or any Soviet-controlled area (see § 6.401–2) shall be presumed to have originated from Soviet-controlled (Chinese) sources, and shall not be acquired for public use unless such supplies have been lawfully imported into the United States, its Territories, its possessions, or Puerto Rico:

Agar-agar.
Bamboo:
Bags, baskets and other manufactures, excluding furniture.
Poles and sticks.
Brocades and brocade articles.
Camphor, natural and synthetic.
Camphor oil, natural and synthetic.
Carpets.

Castor bean.
Castor oil.
Chinaware, other than Dresdenware and Meissenware.
Citronella oil.
Cotton manufactures.
Cotton waste.
Earthenware.
Edible marine products.
Embroideries and embroidered articles.
Feather manufactures.
Glass, sheet (window).
Graphite.
Hair nets, regardless of the material from which made.
Handkerchiefs.
Hardwood manufactures, including furniture other than bentwood furniture.
Hats, paper.
Honey.
Ivory manufactures.
Lace and lace articles.
Linen manufactures, excluding wearing apparel other than wearing apparel made in whole or in part of brocade, embroidery or lace.
Ores and metals:
Antimony.
Bismuth.
Quicksilver.
Molybdenum.
Tin.
Tungsten.
Peanuts and peanut products.
Poultry, including pigeons, frozen or otherwise prepared or preserved.
Ramie.
Rugs.
Seagrass and straw manufactures, excluding floor covering.
Sesame, oil and seed.
Shoes, leather-soled with non-leather uppers, except ladies' high-heel shoes.
Silk:
Raw and manufactures other than Western style suits and Indian saris.
Waste.
Skins, deer and goat.
Stones, semiprecious, and manufacture thereof, including jewelry.
Tapestries, including needlework tapestries.
Tapioca, including tapioca flour.

§ 6.401–5 Supplies from North Korea or China.

All supplies, however processed, which are or were located in or transported from or through North Korea or China (as described in § 6.401–2) shall be presumed to have originated from Soviet-controlled (Chinese) sources, and shall not be acquired for public use unless such supplies have been lawfully imported into the United States, its Territories, its possessions, or Puerto Rico.

§ 6.402 Exceptions.

(a) Exceptions from the general policy will be made only pursuant to paragraphs (b) and (c) of this section. Such exceptions shall be made only in unusual situations, for example, in cases of emergency or where supplies are not available from any other source and a substitute supply is not acceptable.

(b) Supplies, other than those whose procurement is prohibited by § 6.401–3, § 6.401–4 or § 6.401–5, originating from sources within Soviet-controlled areas (see § 6.401–2) may be procured only when:

(1) The purchase is for $2,500 or less and the contracting officer determines there is need for an exception in accordance with Departmental procedures; or

(2) The purchase is for more than $2,500 and an exception is approved by the Secretary of the Department concerned.

Before granting an exception under (2) above, the Secretary concerned shall obtain the advice of the Assistant Secretary of Defense (International Security Affairs): *Provided,* That such advice is not required in the case of emergency purchases or where supplies are not available from any other source and substitute supplies are not acceptable.

(c) Supplies whose procurement is prohibited by §§ 6.401–3, 6.401–4, or § 6.401–5, may be acquired if the acquisition is approved by an authorized Treasury Department representative. Where a request for such approval has been denied by the Treasury Department representative, an appeal may be made to the Secretary of the Treasury. Such appeals, with all pertinent information, shall be submitted through Departmental channels to the Assistant Secretary of Defense (International Security Affairs), for further transmission to the Secretary of the Treasury.

§ 6.403 Contract clause.

(a) Except as provided in paragraph (b) of this section, in contracts for supplies, services, or construction, where acceptance is to take place outside the United States, its Territories, its possessions, or Puerto Rico, the Soviet-controlled areas listed in § 6.401–2 shall be set forth in the contract schedule, and the following clause shall be included in the contract:

SOVIET-CONTROLLED AREAS

(a) The Contractor shall not acquire for use in the performance of this contract any supplies or services originating from sources within Soviet-controlled areas, as listed in the Schedule of this contract, or from Hong Kong or Macao, without the written approval of the Contracting Officer.

(b) The Contractor agrees to insert the provisions of this clause, including the Soviet-controlled areas listed in the Schedule and this subparagraph (b), in all subcontracts hereunder.

(b) The requirements of paragraph (a) of this section do not apply to purchase orders for small purchases (see Part 3, Subpart F of this chapter) where there is other reasonable assurance of compliance with the policy set forth in this subpart.

Subpart E—Canadian Purchases

§ 6.501 Purchases from Canadian suppliers.

Any contract with a supplier or contractor located in the Dominion of Canada may be made with and administered through the Canadian Commercial Corporation (a corporation owned and controlled by the Government of Canada), which has offices at 2450 Massachusetts Avenue NW., Washington, D.C. and 56 Lyon Street, Ottawa, Canada. Under any such contract made with the Canadian Commercial Corporation, direct communication with the Canadian supplier or contractor is authorized only in connection with problems of inspection and technical matters: *Provided,* That, if any such problem would affect the contract price, approval of the Canadian Commercial Corporation shall be obtained. All payments under any such contract made with the Canadian Commercial Corporation shall be made to that Corporation at its Washington office.

§ 6.502 Guarantee by Canadian Government.

The Canadian Government guarantees to the United States Government all commitments, obligations, and covenants of the Canadian Commercial Corporation in connection with any contract or order issued to said Corporation by any procuring activity of the United States Government. The Canadian Government has likewise waived notice of any change or modification which may be made from time to time in these commitments, obligations, or covenants.

§ 6.503 Agreement with Department of Defence Production (Canada).

(a) An agreement, dated 27 July 1956, as amended 17 December 1956, between the Department of Defence Production (Canada) and the Departments of the Army, Navy, and Air Force, sets forth policies and provides procedures with respect to all contracts for supplies and services placed with the Canadian Commercial Corporation on or after October 1, 1956.

(b) The Agreement provides, in pertinent part, that the Canadian Commercial Corporation may, in submitting proposals for negotiated contracts, provide for prices or cost reimbursement, as the case may be, in terms of Canadian currency and that the resulting contract will provide for payment to be made in such currency. In evaluating proposals submitted by the Canadian Commercial Corporation in terms of Canadian currency, the rate of exchange in effect on the date of evaluation of all proposals, submitted in response to a given Request for Proposals, shall be used. When required, the precise rate of exchange of Canadian currency may be obtained from a financial paper of general circulation which reflects the rate as fixed and published by the Federal Reserve Bank of New York, such as the Wall Street Journal or the Journal of Commerce.

§ 6.504 Mutual Canadian-American interests.

Because of the close geographical proximity of the United States and Canada and of the mutual interest of both nations in the defense of North America, various steps have been taken during and since World War II to coordinate their economic efforts in the common defense, so as to achieve:

(a) Greater integration of military production,

(b) Greater standardization of military equipment,

(c) Wider dispersal of production facilities,

(d) Establishment of supplemental sources of supply, and

(e) Greater flow of defense supplies and equipment between the two countries.

Accordingly, it is Department of Defense policy to seek the best possible coordination of the materiel programs of Canada and the United States and to assure Canada a fair opportunity to share in the production of military equipment and materiel involving programs of mutual interest to Canada and the United States and in the research and development connected therewith. Accomplishment of these purposes required the allevation of the restrictions of the Buy American Act with respect to procurements for public use of supplies mined, produced, or manufactured in Canada in the manner prescribed in Subpart A of this part.

Subpart F—Duty and Customs

§ 6.601 Customs duties on foreign purchases.

Duty must ordinarily be paid in connection with the importation of supplies purchased outside of the United States, except that the importation (a) of "emergency purchases of war material abroad" by a Military Department is exempt from duty (10 U.S.C. 2383), and (b) of certain supplies (not including equipment) for vessels or aircraft operated by the United States is also exempt from duty (19 U.S.C. 1309). Where the importation of supplies is subject to customs duties, a Military Department is exempt from any requirements of a customs bond.

§ 6.602 Emergency purchases of war material abroad.

§ 6.602–1 General.

This section furnishes guidance as to what constitutes "emergency purchases of war material abroad," prescribes the conditions under which duty-free entry certificates may be issued in connection with the importation of such purchases and sets forth the form of certificate to be utilized. The procedures to be followed in the issuance of such certificates shall be as prescribed by the respective Departments.

§ 6.602–2 War materials.

As used in this section the term "war material" includes the following:

(a) Weapons, munitions, aircraft, vessels, or boats;

(b) Agricultural, industrial, or other supplies used in the prosecution of war or for the national defense;

(c) Supplies, including components or equipment, necessary for the manufacture, production, processing, repair, servicing, or operation of the supplies set forth in paragraphs (a) and (b) of this section above.

§ 6.602–3 Emergency purchases.

As used in this section, the term "emergency purchases" includes the following:

(a) War material purchased by any Department in time of war or a national emergency, including any war material received in exchange for anything of value obtained under reciprocal aid or other statutory authority;

(b) War material purchased because of a shortage of domestic supply, pursuant to a decision that the supplies are necessary for the adequate maintenance of the Armed Services;

(c) Captured enemy war material;

(d) Materials requisitioned by United States Forces abroad;

(e) Materials rebuilt from other materials owned by, captured by, or turned over to United States Forces; and

(f) War materials procured for the use of United States Forces abroad or United States vessels in foreign waters.

§ 6.602–4 Use of duty-free entry certificates.

The issuance of duty-free entry certificates in appropriate situations will result in important savings for military appropriations. At the same time, any procedure established for the issuance of such certificates must recognize that anything other than a careful selection of the proper situations where such certificates are to be issued may fail to save funds and may result in unanticipated advantages to contractors, especially in situations involving fixed-price contracts. Considerations which are pertinent to the selection of those cases where such certificates should be issued include (a) the savings to be accomplished by the issuance of the certificate; (b) the administrative burden and cost of processing the certificate; and (c) the degree of supervision which can be exercised by the Government over the supplies or materials to be imported to verify that the full benefit of the certificate inures to the Government. The latter consideration is particularly significant in the case of fixed-price contracts since title to the importation does not generally vest in the Government until delivery of the end product.

§ 6.602–5 Limitations.

Subject to the considerations set forth in §§ 6.602–4 and 6.605, a duty-free entry certificate may be issued in accordance with Departmental procedures when an "emergency purchase of war material" is made under the following circumstances:

(a) Direct purchases abroad regardless of whether title passes at point of origin or at destination in the United States: *Providing,* The contract states that the final price is exclusive of duty;

(b) Purchases abroad by a Government prime contractor under a cost-reimbursement type contract or by a cost-reimbursement type subcontractor (where no fixed-price prime or fixed-price subcontract intervenes between the purchaser and the Government), regardless of whether title passes at point of origin or at destination in the United States. If a fixed-price prime or fixed-price subcontract intervenes, the criteria stated in paragraph (c) of this section should be followed; and

(c) Purchases abroad by a fixed-price contractor, fixed-price subcontractor, or cost-type subcontractor where a fixed-price prime or fixed-price subcontract intervenes: *Provided,* (1) The fixed-price prime and, where applicable, fixed-price subcontract prices are, or are amended to be, exclusive of duty; (2) the prime contractor and, where applicable, the subcontractors concerned certify that the supplies so purchased are to be delivered to the Government or incorporated in Government-owned property or in an end product to be furnished to the Government, and that duty will be paid if such supplies or any portion thereof are utilized for other than the performance of the Government contract or disposed of other than for the benefit of the Government in accordance with the contract terms; and (3) such procurement abroad is authorized by the terms of the prime contract, the applicable subcontract, or by the contracting officer.

§ 6.602–6 Duty-free entry certificate.

The duty-free entry certificate referred to in this section will be printed, stamped, or typed on the face of Customs Form 7501 or attached thereto, and will be executed by a duly designated officer or civilian official of the appropriate Department in the following form:

I certify that the procurement of this material constituted an emergency purchase of war material abroad by the Department of the (indicate Army, Navy, or Air Force) and it is accordingly requested that such material be admitted free of duty pursuant to 10 U.S.C. 2383.

(Name)

(Title), who has been designated to execute free entry certificates for the above-named Department

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(Grade)

(Organization)

§ 6.603 Supplies for vessels or aircraft operated by the United States.

(a) Subject to the considerations set forth in § 6.602–4, a duty-free entry certificate may be issued when "certain supplies (not including equipment)" are purchased for vessels or aircraft operated by the United States. As used in this section, the term "certain supplies (not including equipment)" includes articles known as "stores", such as food, medicines and toiletries, and, in addition, all consumable articles necessary and appropriate for the propulsion, operation and maintenance of the vessel or aircraft, such as fuel oil, gasoline, grease, paint, cleansing compounds, solvents, wiping rags and polishes. It does not include portable articles necessary and appropriate for the navigation, operation or maintenance of the vessel or aircraft and for the comfort and safety of the persons on board, such as rope, bolts and nuts, bedding, china and cutlery, which are included in the term "equipment". The procedures to be followed in the issuance of such certificates shall be as prescribed by the respective Departments.

(b) The duty-free entry certificate referred to in this section will be printed, stamped, or typed on the face of Customs Form 7501, or attached thereto, and will be executed by a duly designated officer or civilian official of the appropriate Department in the following form:

I certify that the procurement of this material constituted a purchase of supplies by

the United States for vessels or aircraft operated by the United States, and is admissible free of duty pursuant to 19 U.S.C. 1309.

(Name)

(Title)

(Organization)

§ 6.604 Customs duties and drawbacks.

Whenever any Department purchases supplies with respect to which there might arise a claim to a refund or drawback of customs duties paid thereon (to the extent such drawback is authorized pursuant to the Tariff Act of 1930, 19 U.S. Code, Chapter 4), the price to be paid shall ordinarily include the customs duties, and accordingly the supplier will have no claim to a drawback. On the other hand, when the price to be paid for any such purpose does not include the cusoms duties, then the supplier will have the right to claim any drawback with respect to duties paid by the supplier: *Provided*, (a) He has reserved such right in connection with such sale or consignment and (b) he produces evidence that such reservation was made with the knowledge and consent of the exporter.

§ 6.605 Duty-free entry of listed Canadian supplies.

§ 6.605–1 Policy.

(a) In keeping with the policy to enhance economic cooperation with Canada in the interests of continental defense (§ 6.504), duty-free entry should generally be accorded Canadian supplies that constitute, or that are directly or indirectly incorporated in, end items included in the Departmental lists of supplies maintained pursuant to § 6.103–5(a). (These Departmental lists include supplies of a military character or which are involved in programs of mutual interest to the United States and Canada. Parts and equipment for listed supplies, even though not separately listed, are considered to be included in the lists when they are procured under a contract that also calls for listed supplies.) Duty-free entry should be accorded such supplies by the issuance of duty-free entry certificates in accordance with §§ 6.605 through 6.605–3 and, in particular, as provided in the contract clause prescribed in § 6.605–2.

(b) In connection with contracts with United States prime contractors for the procurement of end items that are not included in the Departmental lists maintained pursuant to § 6.103–5(a) of this part, Canadian supplies that are themselves listed and are specifically identified in the contract as supplies that will be directly or indirectly incorporated in such unlisted end items, should be accorded duty-free entry as provided in § 6.605–3.

§ 6.605–2 Contract clause.

Every contract in excess of $10,000, except construction contracts, that includes the procurement of end items contained in the list maintained by the Department concerned pursuant to § 6.103–5(a) of this part shall include the following clause unless it is reasonably certain that no supplies will be imported from Canada by the contractor or any first- or lower-tier subcontractor in connection with the performance of the contract. The clause will be included in invitations for bids or requests for proposals that are expected to lead to such a contract.

DUTY-FREE ENTRY—CANADIAN SUPPLIES (JULY 1960)

(a) Except as otherwise approved by the Contracting Officer and except with respect to individual shipments on which the duty is $50 or less, no amount is or will be included in the contract price on account of duty with respect to—

(i) all end items which constitute "Canadian end products" (as defined in paragraph 6–101 of the Armed Services Procurement Regulation) to be delivered under this contract; and

(ii) all supplies (including, without limitation, raw materials, components and intermediate assemblies) produced or made in Canada which are to be incorporated in the end items to be delivered under this contract; provided, that such end items are made in the United States or Canada; except supplies imported into the United States prior to the date of this contract, or, in the case of supplies imported by a first- or lower-tier subcontractor hereunder, prior to the date of its subcontract.

(b) All shipping documents submitted to Customs, covering such Canadian end products or supplies for which duty-free entry is to be claimed, shall bear the notation "UNITED STATES (insert name of Military Department)—DUTY FREE ENTRY TO BE CLAIMED under 10 U.S.C. 2383. Collector of Customs kindly notify (insert name and address of Government official and office) upon arrival of shipment at port of entry." The notation will also identify this contract by its contract number.

(c) The Contractor warrants that all such Canadian supplies, for which such duty-free entry is to be claimed, are to be delivered to the Government or incorporated in the end items to be delivered under this contract, and that duty shall be paid by the Contractor to the extent that such supplies, or any portion thereof, are not delivered to the Government or incorporated in such end items or disposed of pursuant to the provisions of this contract.

(d) The Government agrees to execute duty-free entry certificates and to afford such assistance as appropriate in order to obtain the duty-free entry of Canadian end products or supplies as to which the shipping documents bear the notation specified in paragraph (b) above, except as the Contractor may otherwise agree and except with respect to individual shipments on which the duty is $50 or less.

(e) The Contractor agrees to insert the substance of this clause, including this paragraph (e), in all subcontracts for supplies hereunder that exceed $5,000. Each such subcontract shall require the subcontractor to identify this contract by its contract number on any shipping documents submitted to Customs covering supplies for which duty-free entry is to be claimed pursuant to this clause. If the procurement covers both listed and unlisted end items, the foregoing clause should be modified so as to limit its application to the listed end items.

§ 6.605–3 Listed supplies for unlisted end items.

In connection with negotiated contracts in excess of $10,000 with United States prime contractors for the procurement of end items that are not included in the Departmental lists maintained pursuant to § 6.103–5(a), if the prospective contractor specifically identifies listed Canadian supplies that will be directly or indirectly incorporated in such unlisted end items and if the contract price does not include any amount on account of duty with respect to such supplies, the contract should provide for the duty-free entry of such supplies by including provisions substantially as follows. The Schedule should identify the particular listed Canadian supplies that are to be accorded duty-free entry. The contract should include a clause like that in § 6.605–2, but modified so as to cover only the particular Canadian supplies that are specifically identified in the Schedule. Thus, the clause may be modified by:

(a) In paragraph (a), deleting (i) and (ii) and substituting the words "those supplies that are specifically identified in the Schedule as Canadian supplies to be accorded duty-free entry."

(b) In paragraph (b) of the clause, deleting the words "end products or,"

(c) In paragraph (d) of the clause, deleting the words "Canadian end products or supplies" and substituting a reference to the particular Canadian listed supplies, as in paragraph (a) of this section, and

(d) As to paragraph (e) of the clause, limiting the "flowdown" provision to subcontracts for supplies specifically identified in the Schedule, or, if appropriate, deleting the provision.

§ 6.605–4 Amending existing contracts.

Any existing contract may be amended so as to be made consistent with § 6.605–2 or § 6.605–3; provided that, in the case of a fixed-price type contract, the contract price is reduced by the amount of the applicable duty. Under any cost-reimbursement type contract that has not been so amended, duty-free entry shall be accorded Canadian supplies to the extent permitted by § 6.602 except with respect to individual shipments on which the duty is $50 or less.

Subpart G—Mutual Security Act Procurements

§ 6.701 Exemption from examination of records requirement.

§ 6.701–1 General.

With respect to purchases authorized to be made outside the United States under the Mutual Security Act of 1954, as amended, Executive Order No. 10784, dated October 1, 1958, as amended by Executive Order No. 10845, dated October 12, 1959, exempts:

(a) Contracts with foreign contractors to be performed outside the United States from the examination of records requirements of 10 U.S.C. 2313(b); and

(b) Contracts, and amendments and modifications thereof, entered into pursuant to Public Law 85–804 (§ 17.501 of this chapter), from the examination of records requirements of section 3(b) of that law: *Provided*, That, with respect to such contracts and amendments and modifications thereof, inclusion of the "Examination of Records" clause or compliance therewith is determined by the Department concerned to be impracticable. Such determinations may

be made by any officer or official authorized to approve contracts, and amendments and modifications thereof, pursuant to § 17.201 of this chapter.

§ 6.701–2 Contracts with foreign governments.

(a) *Fixed-price contracts.* The Examination of Records clause set forth in § 7.104–15 of this chapter shall be omitted from government-to-government contracts within the scope of § 6.701–1(a).

(b) *Cost-reimbursement type contracts.* In government-to-government contracts within the scope of § 6.701–1(a), the Records clause set forth in § 7.203–7(a) of this chapter shall be modified as follows. Subparagraph (3) of the clause shall be deleted; the references in subparagraphs (4) and (5) to "documentary evidence delivered pursuant to subparagraph (3)" shall be deleted; the references to "the Comptroller General" and "his authorized representatives" shall be deleted from subparagraphs (2), (4), (5), and paragraph (b), and the word "Department" shall be inserted in lieu of the reference to Comptroller General in the proviso in subparagraph (4). In such cases, where the Records clause required by § 7.203–7 of this chapter is to be modified as provided in § 7.203–7(b) of this chapter, subparagraph (4) as set forth therein shall be modified to correspond with the modifications prescribed above.

§ 6.701–3 Contracts with other foreign contractors.

In any particular contract within the scope of § 6.701–1(a) which is made with a foreign contractor other than a foreign government, the Examination of Records clause set forth in § 7.104–15 of this chapter may be omitted (in the case of a fixed-price contract) and the Records clause set forth in § 7.203–7 of this chapter may be modified as indicated in § 6.701–2(b) (in the case of a cost-reimbursement type contract) if such omission or modification is approved by the contracting activity concerned in accordance with Departmental procedures, following a determination that such omission or modification will further the purposes of the Mutual Security Act of 1954.

PART 7—CONTRACT CLAUSES

Sec.
7.000 Scope of part.

Subpart A—Clauses for Fixed-Price Supply Contracts

7.100 Scope of subpart.
7.102 Applicability.
7.103 Required clauses.
7.103–1 Definitions.
7.103–2 Changes.
7.103–3 Extras.
7.103–4 Variation in quantity.
7.103–5 Inspection.
7.103–6 Responsibility for supplies.
7.103–7 Payments.
7.103–8 Assignment of claims.
7.103–9 Additional bond security.
7.103–10 Federal, State and local taxes.
7.103–11 Default.
7.103–12 Disputes.
7.103–13 Renegotiation.
7.103–14 [Reserved]
7.103–15 Soviet-controlled areas.
7.103–16 Eight-hour law of 1912.
7.103–17 Walsh-Healy Public Contracts Act.
7.103–18 Nondiscrimination in employment.
7.103–19 Officials not to benefit.
7.103–20 Covenant against contingent fees.
7.103–21 Termination for convenience of the Government.
7.103–22 Authorization and consent.
7.103–23 Notice and assistance regarding patent infringement.
7.104 Clauses to be used when applicable.
7.104–1 Davis-Bacon Act.
7.104–2 Copeland Act.
7.104–3 Buy American Act.
7.104–4 Notice to the Government of labor disputes.
7.104–5 Patent indemnity.
7.104–6 Filing of patent applications.
7.104–7 Patent rights.
7.104–8 Reporting of royalties.
7.104–9 Rights in data.
7.104–10 Ground and flight risk.
7.104–11 Excess profit.
7.104–12 Military security requirements.
7.104–13 Preference for certain domestic commodities.
7.104–14 Utilization of small business concerns.
7.104–15 Examination of records.
7.104–16 Gratuities.
7.104–17 Convict labor.
7.104–18 Priorities, allocations and allotments.
7.104–19 Cargo preference act.
7.104–20 Utilization of concerns in labor surplus areas.
7.104–21 Limitation on withholding of payments.
7.104–22 Defense subcontracting small business program.
7.104–23 Subcontracts.
7.104–24 Government-furnished property.
7.104–25 Special tooling.
7.104–26 Changes to make or buy program.
7.104–27 Payment for overtime and shift premiums.
7.104–28 Quality Control System.
7.105 Additional clauses.
7.105–1 Alterations in contract.
7.105–2 Approval of contract.
7.105–4 Notice of shipments.
7.105–5 Liquidated damages.
7.105–6 Bill of Materials.
7.105–7 Material inspection and receiving report.
7.105–8 Stop work orders.
7.106 Price escalation clauses (established prices).
7.106–1 Escalation clause for basic steel, aluminum, brass, bronze or copper mill products.
7.106–2 Escalation clause for non-standard steel items.
7.106–3 Escalation clause for standard supplies.
7.106–4 Escalation clause for semi-standard supplies.
7.107 Price escalation clause (labor and material).
7.108 Incentive price revision clause.
7.109 Price redetermination clauses.
7.109–1 General.
7.109–2 Prospective periodic price redetermination at stated intervals.
7.109–3 Prospective price redeterminations on request.
7.109–4 Retroactive and prospective price redetermination at a stated time prior to completion.
7.109–5 Retroactive and prospective price redetermination including further prospective redetermination on request.
7.109–6 Retroactive price redetermination after completion.
7.109–7 Modified retroactive and prospective price redetermination for follow-on contracts.

Subpart B—Clauses for Cost-Reimbursement Type Supply Contracts

7.200 Scope of subpart.
7.202 Applicability.
7.203 Required clauses.
7.203–1 Definitions.
7.203–2 Changes.
7.203–3 Limitation of cost.
7.203–4 Allowable Cost, Fee, and Payment.
7.203–5 Inspection of supplies and correction of defects.
7.203–6 Assignment of claims.
7.203–7 Records.
7.203–8 Subcontracts.
7.203–9 Utilization of small business concerns.
7.203–10 Termination.
7.203–11 Excusable delays.
7.203–12 Disputes.
7.203–13 Renegotiation.

Sec.
7.203–14 [Reserved]
7.203–15 Convict labor.
7.203–16 Eight-Hour Law of 1912—Overtime compensation.
7.203–17 Walsh-Healey Public Contracts Act.
7.203–18 Nondiscrimination in employment.
7.203–19 Officials not to benefit.
7.203–20 Covenant against contingent fees.
7.203–21 Government property.
7.203–22 Insurance; liability to third persons.
7.203–23 Authorization and consent.
7.203–24 Notice and assistance regarding patent infringement.
7.203–25 Soviet-controlled areas.
7.203–26 Utilization of concerns in labor surplus areas.
7.203–27 Payment for overtime and shift premiums.
7.204 Clauses to be used when applicable.
7.204–1 Davis-Bacon Act.
7.204–2 Copeland Act.
7.204–3 Buy American Act.
7.204–4 Notice to the Government of labor disputes.
7.204–5 Patent indemnity.
7.204–6 Filing of patent applications.
7.204–7 Patent rights.
7.204–8 Reporting of royalties.
7.204–9 Rights in data.
7.204–10 Quality Control System.
7.204–11 Excess profit.
7.204–12 Military security requirements.
7.204–13 Preference for certain domestic commodities.
7.204–14 Gratuities.
7.204–15 Priorities, allocations and allotments.
7.204–16 Negotiated overhead rates.
7.204–17 Cargo preference act.
7.204–18 Limitation on withholding of payments.
7.204–19 Defense subcontracting small business program.
7.204–20 Changes to make or buy program.
7.205 Additional clauses.
7.205–1 Alteration in contract.
7.205–2 Approval of contract.
7.205–4 Bill of materials.
7.205–6 Materiel inspection and receiving report.
7.205–7 Stop work orders.

Subpart C—Clauses for Fixed-Price Research and Development Contracts

7.301 Applicability.
7.302 Required clauses.
7.302–1 Definitions.
7.302–2 Payments.
7.302–3 Standards of work.
7.302–4 Inspection.
7.302–5 Assignment of claims.
7.302–6 Examination of records.
7.302–7 Federal, State, and local taxes.
7.302–8 Utilization of small business concerns.
7.302–9 Default.
7.302–10 Termination for convenience of the government.
7.302–11 Disputes.
7.302–12 Renegotiation.
7.302–13 Buy American Act.
7.302–14 Convict labor.
7.302–15 Walsh-Healey Public Contracts Act.
7.302–16 Eight-Hour Law of 1912—overtime compensation.
7.302–17 Nondiscrimination in employment.
7.302–18 Officials not to benefit.
7.302–19 Covenant against contingent fees.
7.302–20 Gratuities.
7.302–21 Authorization and consent.
7.302–22 Notice and assistance regarding patent infringement.
7.302–23 Patent rights:
7.302–24 Basic data clause.
7.302–25 Military security requirements.
7.302–26 Utilization of labor surplus area concerns.
7.303 Clauses to be used when applicable.
7.303–1 Clauses for contracts involving construction work.
7.303–2 Filing of patent applications.
7.303–3 Reporting of royalties.
7.303–4 Excess profit.
7.303–5 Preference for certain domestic commodities.
7.303–6 Priorities, allocations, and allotments.
7.303–7 Government-furnished property.
7.303–8 Soviet-controlled areas.
7.303–9 Notice to the government of labor disputes.
7.303–10 Limitation on withholding of payments.
7.303–11 Defense subcontracting small business program.
7.303–12 Subcontracts.
7.303–13 Changes to make or buy program.
7.303–14 Payment for overtime and shift premiums.
7.303–15 Quality Control System.
7.304 Additional clauses.
7.304–1 Changes.
7.304–2 Alterations in contract.
7.304–3 Approval of contract.
7.304–4 Bill of materials.
7.304–5 Notice of shipments.
7.304–6 Stop work orders.
7.304–7 Reports of work.

Subpart D—Clauses for Cost-Reimbursement Type Research and Development Contracts

7.400 Scope of subpart.
7.401 Applicability.
7.402 Required clauses.
7.402–1 Definitions.
7.402–2 Limitation of cost.
7.402–3 Allowable cost, fixed fee, and payment.
7.402–4 Standards of work.
7.402–5 Inspection and correction of defects.
7.402–6 Assignment of claims.
7.402–7 Records
7.402–8 Subcontracts.
7.402–9 Utilization of small business concerns.
7.402–10 Termination.
7.402–11 Disputes.
7.402–12 Renegotiation.
7.402–13 Buy American Act.
7.402–14 Convict labor.
7.402–15 Walsh-Healey Public Contracts Act.
7.402–16 Eight-Hour Law of 1912—overtime compensation.
7.402–17 Nondiscrimination in employment.
7.402–18 Officials not to benefit.
7.402–19 Covenant against contingent fees.
7.402–20 Authorization and consent.
7.402–21 Notice and assistance regarding patent infringement.
7.402–22 Patent rights.
7.402–23 Basic data clause.
7.402–24 Military security requirements.
7.402–25 Government property.
7.402–26 Insurance—liability to third persons.
7.402–27 Utilization of labor-surplus area concerns.
7.402–28 Payment for overtime and shift premiums.
7.403 Clauses to be used when applicable.
7.403–1 Clauses for contracts involving construction work.
7.403–2 Filing of patent applications.
7.403–3 Reporting of royalties.
7.403–4 Excess profit.
7.403–5 Excusable delays.
7.403–6 Preference for certain domestic commodities.
7.403–7 Priorities, allocations, and allotments.
7.403–8 Soviet-controlled areas.
7.403–9 Negotiated overhead rate.
7.403–10 Notice to the Government of labor disputes.
7.403–11 Gratuities.
7.403–12 Limitation on withholding of payments.
7.403–13 Defense subcontracting small business program.
7.403–14 Changes to make or buy program.
7.403–15 Quality control system.
7.404 Additional clauses.
7.404–1 Changes.
7.404–2 Alterations in contract.
7.404–3 Approval of contract.
7.404–4 Bill of materials.
7.404–5 Stop work orders.
7.404–6 Reports of work.

Subpart E—Clauses for Personal Services Contracts

7.500 Scope of subpart.
7.502 Applicability.
7.503 Required clauses.
7.503–1 Definitions.
7.503–2 Payments.
7.503–3 Assignment of claims.
7.503–4 Disputes.
7.503–5 Officials not to benefit.
7.503–6 Covenant against contingent fees.
7.503–7 Termination.
7.503–8 Approval of contract.
7.503–9 Patents.
7.504 Clauses to be used when applicable.
7.504–1 Military security requirements.
7.504–2 Data and copyrights.
7.505 Additional clause.
7.505–1 Alterations in contract.

AUTHORITY: §§ 7.000 to 7.505–1 issued under R. S. 161, sec. 2202, 70A Stat. 120; 5 U. S. C. 22, 10 U. S. C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U. S. C. 2301–2314.

§ 7.000 Scope of part.

This part sets forth uniform contract clauses for use in connection with the procurement of supplies and services.

Subpart A—Clauses for Fixed-Price Supply Contracts

§ 7.100 Scope of subpart.

This subpart sets forth uniform contract clauses for use in fixed-price supply contracts as defined in § 7.102.

§ 7.102 Applicability.

As used throughout this subpart, the term "fixed-price supply contract" shall mean any contract (a) entered into either by formal advertising or by negotiation, other than (1) purchase orders (but see §§ 7.104–15 and 7.104–16), (2) short form negotiated supply contracts (see § 16.202 of this chapter), (3) letter contracts, (4) notices of award, and (5) amendments or supplemental agreements to contracts or purchase orders, which do not effect new procurement; (b) at a fixed price (with or without provision for price redetermination, escalation or other form of price revision as covered in § 3.403); and (c) for supplies other than (1) the construction, alteration, or repair of buildings, bridges, roads, or other kinds of real property, (2) experimental, developmental, or research work, or (3) facilities to be provided by the Government under a "Facilities Contract" as defined in Part 13 of this subchapter.

§ 7.103 Required clauses.

The following clauses shall be inserted in all fixed-price supply contracts:

§ 7.103–1 Definitions.

DEFINITIONS (JAN. 1958)

As used throughout this contract, the following terms shall have the meanings set forth below:

(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, and the head or any assistant head of the Federal agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(c) Except as otherwise provided in this contract, the term "subcontracts" includes purchase orders under this contract.

Additional definitions may be included: *Provided,* They are not inconsistent with the foregoing clause of the provisions of this subchapter.

§ 7.103–2 Changes.

CHANGES (JAN. 1958)

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) Drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Where the cost of property made obsolete or excess as result of a change is included in the Contractor's claim for adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of such property. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

In the foregoing clause, the period of "30 days" within which any claim for adjustment must be asserted may be varied in accordance with Department procedures.

§ 7.103–3 Extras.

EXTRAS (JULY 1949)

Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer.

§ 7.103–4 Variation in quantity.

VARIATION IN QUANTITY (JULY 1949)

No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.

§ 7.103–5 Inspection.

INSPECTION (MAY 1958)

(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance.

(b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Contracting Officer, corrected in place by and at the expense of the Contractor promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirments of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby, or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Government except as otherwise provided in this contract: *Provided,* That in case of rejection the Government shall not be liable for any reduction in value of samples used in connection with such inspection or test. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the Contractor or when reinspection or retest is necessitated by prior rejection. Acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this contract; but failure to inspect and accept or reject supplies shall neither relieve the Contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the Government therefor.

(d) The inspection and test by the Government of any supplies or lots thereof does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Except as otherwise provided in this contract, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

(e) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the supplies hereunder. Records of all inspection work by the Contractor shall be kept complete and available to the Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract.

§ 7.103–6 Responsibility for supplies.

RESPONSIBILITY FOR SUPPLIES (JAN. 1958)

Except as otherwise provided in this contract, (i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection; (ii) after delivery to the Government at the designated point and prior to acceptance by the Government or rejection and giving notice thereof by the Government, the Government shall be responsible for the loss or destruction of or damage to the supplies only if such loss, destruction, or damage results from the negligence of officers, agents, or employees of the Government acting within the scope of their employment; and (iii) the Contractor shall bear all risks as to rejected supplies after notice of rejection, except that the Government shall be responsible for the loss, or destruction of, or damage to the supplies only if such loss, destruction or damage results from the gross negligence of officers, agents, or employees of the Government acting within the scope of their employment.

§ 7.103–7 Payments.

PAYMENTS (JAN. 1958)

The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either $1,000 or 50 percent of the total amount of this contract.

In contracts for the furnishing of transportation and accessorial services there will be substituted for the word "proper" above, the words "properly certified."

§ 7.103–8 Assignment of claims.

ASSIGNMENT OF CLAIMS (JAN. 1958)

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940 as amended (31 U. S. Code 203, 41 U. S. Code 15), if this contract provides for payments aggregating $1,000 or more, claims for monies due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this contract, payments to an assignee of

any monies due or to become due under this contract shall not, to the extent provided in said act, as amended, be subject to reduction or set-off.

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same: *Provided,* That a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

The last sentence of paragraph (a) of the foregoing clause shall be included in contracts only in time of war, or national emergency proclaimed by the President (including the National Emergency Proclamation of December 16, 1950) or by Act or Joint Resolution of the Congress and shall not be included in contracts entered into after such war or national emergency has been terminated: *Provided,* That in cases where special circumstances make it advisable in the best interests of the Government, and in accordance with Departmental procedures, such sentence may be omitted. In any event the sentence will be deleted from negotiated contracts entered into with foreign contractors.

Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended by Public Law 30, 82d Congress, the effect of the last sentence of paragraph (a) of the foregoing clause is that payments to be made to an assignee after 15 May 1951 of any monies due or to become due under the contract shall not be subject to reduction or set-off for any liability of any nature of the contractor to the Government which arises independently of the contract, or for any liability of the contractor on account of (i) renegotiation under any renegotiation statute or under any statutory renegotiation clause in the contract, (ii) fines, (iii) penalties (which term does not include amounts which may be collected or withheld from the contractor in accordance with or for failure to comply with the terms of the contract), or (iv) taxes, Social Security contributions, or the withholding or nonwithholding of taxes or Social Security contributions, whether arising from or independently of the contract.

The assignee is required by said act, as amended, to "File written notice of the assignment together with a true copy of the instrument of assignment with (a) the contracting officer or the head of his department or agency; (b) the surety or sureties upon the bond or bonds, if any, in connection with such contract; and (c) the disbursing officer, if any, designated in such contract to make payment."

§ 7.103–9 Additional bond security.

ADDITIONAL BOND SECURITY (JULY 1949)

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

§ 7.103–10 Federal, State and local taxes.

Insert the clause set forth in § 11.401–1 or § 11.401–2 of this chapter, as the case may be.

§ 7.103–11 Default.

Insert the clause set forth in § 8.707 of this chapter.

§ 7.103–12 Disputes.

(a) Except as provided in paragraph (b) of this section, insert the following clause:

DISPUTES (JAN. 1958)

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) of this section: *Provided,* That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law. In accordance with Departmental procedures, the foregoing clause may be modified to provide for intermediate appeal to the Head of the Procuring Activity concerned. The decision of the contracting officer referred to in the above clause shall, if mailed, be sent by certified mail, return receipt requested.

(b) In procurements to be performed outside the United States, its possessions and Puerto Rico, where it is anticipated that the contractor will be a foreign firm, either the clause in (a) above will be used after modifying it to insert "United States" before "court of competent jurisdiction" or the following clause will be inserted:

DISPUTES (JAN. 1960)

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Secretary. The decision of the Secretary or his duly authorized representative for the determination of such appeals shall be final and conclusive to the extent permitted by United States law. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: *Provided,* That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

In accordance with Departmental procedures, the foregoing clause may be modified to provide for intermediate appeal.

(c) The form in which the contracting officer shall notify the contractor of his decision under the Disputes clause is set forth in § 1.314 of this subchapter.

§ 7.103–13 Renegotiation.

(a) Except as provided in paragraph (b) of this section, insert the following clause:

RENEGOTIATION (OCT. 1959)

(a) To the extent required by law, this contract is subject to the Renegotiation Act of 1951 (50 U.S.C. App. 1211, et seq.), as amended, and to any subsequent act of Congress providing for the renegotiation of Contracts. Nothing contained in this clause shall impose any renegotiation obligation with respect to this contract or any subcontract hereunder which is not imposed by an act of Congress heretofore or hereafter enacted. Subject to the foregoing this contract shall be deemed to contain all the provisions required by section 104 of the Renegotiation Act of 1951, and by any such other act, without subsequent contract amendment specifically incorporating such provisions.

(b) The Contractor agrees to insert the provisions of this clause, including this paragraph (b), in all subcontracts, as that term is defined in section 103g of the Renegotiation Act of 1951, as amended.

(b) A Renegotiation clause is not required in contracts with foreign governments or agencies thereof. Except in such contracts, the clause set forth below should be inserted, in lieu of the clause in paragraph (a) of this section, in contracts which are to be wholly performed outside the United States by a contractor which is not engaged in a trade or business in the United States and is:

(1) An individual who is not a national of the United States;

(2) A partnership or joint venture in which individuals who are not nationals of the United States or corporations which are not domestic corporations are entitled to more than 50 percent of the profits; or

(3) A corporation (other than a domestic corporation) more than 50 percent of the voting stock of which is owned directly or indirectly by persons described in subparagraph (1) and (2) of this paragraph:

RENEGOTIATION (OCT. 1959)

(a) This contract has been determined to be exempt from the provisions of the Renegotiation Act of 1951 (50 U.S.C. App. 1211, et seq.), as amended, since it is intended to be wholly performed outside the United States and the Contractor is not engaged in a trade or business in the United States and is—

(i) An individual who is not a national of the United States;

(ii) A partnership or joint venture in which individuals who are not nationals of the United States or corporations which are not domestic corporations are entitled to more than 50 percent of the profits; or

(iii) A corporation (other than a domestic corporation) more than 50 percent of the voting stock of which is owned directly or indirectly by persons described in (i) and (ii) above.

(b) This contract shall cease to be exempt from the Renegotiation Act of 1951, as amended, if all of the requirements for exemption set forth in paragraph (a) above are not met at all times during the performance of this contract. If the Contractor does not meet all of these requirements during the entire performance of this contract, this contract shall be subjected to the Renegotiation Act of 1951, as amended, and to any subsequent act of the United States Congress providing for the renegotiation of contracts, *Provided, however,* That nothing contained in this clause shall impose any renegotiation obligation with respect to this contract or any subcontract hereunder which is not imposed by an act of the United States Congress heretofore or hereafter enacted. In the event this contract becomes subject to the Renegotiation Act of 1951, it shall be deemed to contain all the provisions required by Section 104 of that Act, and by any such other act, without subsequent contract amendment specifically incorporating such provisions.

(c) The Contractor agrees to insert the provisions of this clause, including this paragraph (c), in all subcontracts, as that term is defined in Section 103g of the Renegotiation Act of 1951, as amended, which meet the requirements for exemption from the Renegotiation Act of 1951 set forth in paragraph (a) hereof. The Contractor agrees to insert the following clause in all subcontracts which do not meet the requirements set forth in paragraph (a):

RENEGOTIATION

(a) To the extent required by law, this contract is subject to the Renegotiation Act of 1951 (50 U.S.C. App. 1211, et seq.), as amended, and to any subsequent act of the United States Congress providing for the renegotiation of contracts. Nothing contained in this clause shall impose any renegotiation obligation with respect to this contract or any subcontract hereunder which is not imposed by an act of the United States Congress heretofore or hereafter enacted. Subject to the foregoing this contract shall be deemed to contain all the provisions required by Section 104 of the Renegotiation Act of 1951, and by any such other act, without subsequent contract amendment specifically incorporating such provisions.

(b) The Contractor agrees to insert the provisions of this clause, including this paragraph (b), in all subcontracts, as that term is defined in Section 103g of the Renegotiation Act of 1951, as amended.

§ 7.103–14 [Reserved]

§ 7.103–15 Soviet-controlled areas.

In accordance with the requirements of § 6.403 of this subchapter, insert the contract clause set forth therein.

§ 7.103–16 Eight-hour law of 1912—overtime compensation.

Insert the contract clause set forth in § 12.303–1 of this subchapter. Note the introductory provision required by § 12.303–2 of this subchapter in the case of contracts with a State or political subdivision thereof.

§ 7.103–17 Walsh-Healey Public Contracts Act.

Insert the clause set forth in § 12.604 of this subchapter.

§ 7.103–18 Nondiscrimination in employment.

Insert the clause set forth in § 12.802 of this subchapter.

§ 7.103–19 Officials not to benefit.

OFFICIALS NOT TO BENEFIT (JULY 1949)

No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

§ 7.103–20 Covenant against contingent fees.

COVENANT AGAINST CONTINGENT FEES (JAN. 1958)

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage or contingent fee.

§ 7.103–21 Termination for convenience of the Government.

Insert the contract clause appropriate for use in fixed-price supply contracts as set forth in Part 8, Subpart G, of this subchapter, §§ 8.701 and 8.705.

§ 7.103–22 Authorization and consent.

Insert the contract clause set forth in § 9.102–1 of this subchapter.

§ 7.103–23 Notice and assistance regarding patent infringement.

Insert the contract clause set forth in § 9.104 of this subchapter.

§ 7.104 Clauses to be used when applicable.

§ 7.104–1 Davis-Bacon Act.

In accordance with the requirements of Subpart D of Part 12 of this subchapter, insert the applicable contract clauses set forth in § 12.403–1 or § 12.403–4 of this subchapter, as the case may be.

§ 7.104–2 Copeland Act.

In accordance with the requirements of Subpart D of Part 12 of this subchapter, insert the applicable contract clauses set forth in §§ 12.403–1 or 12.403–4, as the case may be.

§ 7.104–3 Buy American Act.

In accordance with the requirements of § 6.104–5 of this chapter, insert the clause set forth therein.

§ 7.104–4 Notice to the Government of labor disputes.

Insert the clause set forth below in all contracts involving the furnishing or production of any item on the Department of Defense Master Urgency List and in any other contract of a class or kind which the Head of the Procuring Activity concerned determines to be appropriate for the use of such a clause.

NOTICE TO THE GOVERNMENT OF LABOR DISPUTES (SEPT. 1958)

(a) Whenever the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor shall immediately give notice thereof, including all relevant information with respect thereto, to the Contracting Officer.

(b) The Contractor agrees to insert the substance of this clause including this paragraph (b), in any subcontract hereunder as to which a labor dispute may delay the timely performance of this contract; except that each such subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the subcontractor shall immediately notify its next higher tier subcontractor, or the prime contractor, as the case may be, of all relevant information with respect to such dispute.

§ 7.104–5 Patent indemnity.

In accordance with the requirements of § 9.103 of this chapter, insert the appropriate contract clause, with additional provisions as prescribed, set forth in said section.

§ 7.104–6 Filing of patent applications.

In accordance with the requirements of § 9.106 or § 9.106–1 of this subchapter, insert either of the contract clauses set forth therein, as appropriate.

§ 7.104–7 Patent rights.

In accordance with the requirements of § 9.107 of this chapter, insert the appropriate clause with additional provisions as prescribed, set forth in said section.

§ 7.104–8 Reporting of royalties.

In accordance with the requirements of § 9.110 of this chapter, insert the contract clause set forth therein.

§ 7.104–9 Rights in data.

In accordance with the requirements of Subpart B of Part 9 of this chapter, insert one of the contract clauses set forth in § 9.203 or § 9.204 of this chapter, as appropriate.

§ 7.104–10 Ground and flight risk.

In all negotiated fixed-price typed contracts for production or modification of aircraft (or missiles having the general characteristics of aircraft), insert the clause set forth in § 10.404 of this subchapter.

§ 7.104–11 Excess profit.

(a) Pursuant to 10 U.S.C. 2382 and 7300 and except as provided in (b) and (c) below, any contract in an amount which exceeds or may exceed $10,000 known to be for the construction or manufacture of all or part of any com-

plete aircraft or naval vessel, shall contain the following clause, except that the words "if this contract is in an amount which exceeds $10,000" may be inserted at the beginning of the clause in formally advertised contracts:

EXCESS PROFITS (JUNE 1957)

The Contractor agrees that, unless otherwise provided by law, this contract shall be subject to all the provisions of 10 U. S. C. 2382 and 7300 and shall be deemed to contain all the agreements required by those sections: *Provided, however,* That this clause shall not be construed to enlarge or extend by contract the obligations imposed by those sections. The Contractor agrees to insert in the subcontracts specified in those sections either the provisions of this clause or the provisions required by those sections.

(b) In any contract where only certain items or lots totaling more than $10,000 are subject to 10 U. S. C. 2382 or 7300, the foregoing clause should be modified to make the agreement of the contractor applicable only to such items or lots. In any contract where only certain items or lots totaling $10,000 or less would otherwise be subject to 10 U. S. C. 2382 or 7300, the foregoing clause should not be included in the contract even though the total amount of the entire contract exceeds $10,000.

(c) In any contract, otherwise subject to 10 U. S. C. 2382 or 7300, for scientific equipment used for communication, target detection, navigation or fire control, as designated by the Secretary, the clause prescribed in (a) above shall not be included, and the following clause shall be inserted in lieu thereof:

EXCESS PROFIT (JUNE 1957)

The Secretary having designated the supplies called for by this contract to be scientific equipment used for communication, target detection, navigation or fire control, the provisions of 10 U. S. C. 2382 and 7300, are not applicable to this contract.

§ 7.104–12 Military security requirements.

Insert the following clause in all contracts which are classified by a Department as "Confidential," including "Confidential—Modified Handling Authorized," or higher and in any other contracts the performance of which will require access to such classified information or material, except that this clause shall not be used in contracts performed outside the United States, its Territories, its possessions, and Puerto Rico. In those cases where the situation so warrants because of the nature of the item, or conditions under which it is to be produced, the contract shall provide and establish by a separate contract provision such additional security safeguards as may be required for the protection of that item. When the "Military Security Requirements" clause is inserted in any contract, the contracting officer or his authorized representative shall prepare and transmit to the contractor, material inspector, security office of the cognizant Military Department of the facility receiving the prime contract, and such other agencies as may be determined by the Departments, a Security Requirements Check List (DD Form 254) in accordance with § 16.811 of this subchapter. The Security Requirements Check List will also be furnished by the contracting Military Department to the cognizant security office when a classified subcontract is placed under a prime contract which contains the "Military Security Requirements" clause. However, if the procurement is for a research contract, consultant service, or graphic arts service, in which there is no requirement for a breakdown by classification of the various elements of the contract, or subcontract, a letter or other written notice of classification for the entire contract may be used in lieu of the Security Requirements Check List.

MILITARY SECURITY REQUIREMENTS (JUNE 1958)

(a) The provisions of this clause shall apply to the extent that this contract involves access to information classified "Confidential" including "Confidential—Modified Handling Authorized" or higher.

(b) The Government shall notify the Contractor of the security classification of this contract and the elements thereof, and of any subsequent revisions in such security classification, by the use of a Security Requirements Check List (DD Form 254), or other written notification.

(c) To the extent the Government has indicated as of the date of this contract or thereafter indicates security classification under this contract as provided in paragraph (b) above, the Contractor shall safeguard all classified elements of this contract and shall provide and maintain a system of security controls within its own organization in accordance with the requirements of:

(1) The Security Agreement (DD Form 441), including the Department of Defense Industrial Security Manual for Safeguarding Classified Information as in effect on date of this contract, and any modification to the Security Agreement for the purpose of adapting the Manual to the Contractor's business; and

(2) Any amendments to said Manual made after the date of this contract, notice of which has been furnished to the Contractor by the Security Office of the Military Department having security cognizance over the facility.

(d) Representatives of the Military Department having security cognizance over the facility and representatives of the contracting Military Department shall have the right to inspect at reasonable intervals the procedures, methods, and facilities utilized by the Contractor in complying with the security requirements under this contract. Should the Government, through these representatives, determine that the Contractor is not complying with the security requirements of this contract the Contractor shall be informed in writing by the Security Office of the cognizant Military Department of the proper action to be taken in order to effect compliance with such requirements.

(e) If subsequent to the date of this contract, the security classifications or security requirements under this contract are changed by the Government as provided in this clause and the security costs under this contract are thereby increased or decreased, the contract price shall be subject to an equitable adjustment by reason of such increased or decreased costs. Any equitable adjustment shall be accomplished in the same manner as if such changes were directed under the "Changes" clause in this contract.

(f) The Contractor agrees to insert, in all subcontracts hereunder which involve access to classified information, provisions which shall conform substantially to the language of this clause, including this paragraph (f) but excluding the last sentence of paragraph (e) of this clause.

(g) The Contractor also agrees that it shall determine that any subcontractor proposed by it for the furnishing of supplies and services which will involve access to classified information in the Contractor's custody has been granted an appropriate facility security clearance, which is still in effect, prior to being accorded access to such classified information.

§ 7.104–13 Preference for certain domestic commodities.

In accordance with the requirements of § 6.305 of this chapter, insert the clause set forth therein.

§ 7.104–14 Utilization of small business concerns.

Insert the clause set forth below in all fixed-price supply contracts, in amounts exceeding $5,000, except those contracts entered into with foreign contractors which are to be performed outside of the United States, its Territories, its possessions, and Puerto Rico.

UTILIZATION OF SMALL BUSINESS CONCERNS (JAN. 1958)

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.

§ 7.104–15 Examination of records.

Pursuant to 10 U.S.C. 2313(b), the following clause will be inserted in all negotiated fixed-price supply contracts in excess of $2,500, except as provided in § 6.701 of this subchapter.

EXAMINATION OF RECORDS (JAN. 1959)

(a) The Contractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers and records of the Contractor involving transactions related to this contract.

(b) The Contractor further agrees to include in all his subcontracts hereunder a provision to the effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor involving transactions related to the subcontract. The term "subcontract" as used in this clause excludes (i) purchase orders not exceeding $1,000 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

§ 7.104–16 Gratuities.

Insert the clause set forth below in all fixed price supply contracts and purchase orders, except contracts and purchase orders with foreign governments obligating solely funds other than those contained in Department of Defense appropriation acts.

GRATUITIES (MAR. 1952)

(a) The Government may, by written notice to the Contractor, terminate the right of the Contractor to proceed under this contract if it is found, after notice and hearing,

by the Secretary or his duly authorized representative, that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by the Contractor, or any agent or representative of the Contractor, to any officer or employee of the Government with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing, of such contract: *Provided*, That the existence of the facts upon which the Secretary or his duly authorized representative makes such findings shall be in issue and may be reviewed in any competent court.

(b) In the event this contract is terminated as provided in paragraph (a) hereof, the Government shall be entitled (i) to pursue the same remedies against the Contractor as it could pursue in the event of a breach of the contract by the Contractor, and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the Secretary or his duly authorized representative) which shall be not less than three nor more than ten times the costs incurred by the Contractor in providing any such gratuities to any such officer or employee.

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

§ 7.104–17 Convict labor.

In accordance with the requirements of Subpart B of Part 12 of this subchapter, insert the contract clause set forth in § 12.203 of this subchapter.

§ 7.104–18 Priorities, allocations and allotments.

In accordance with the requirements of § 1.307–2 of this subchapter insert the following clause:

PRIORITIES, ALLOCATIONS AND ALLOTMENTS (JAN. 1955)

The Contractor agrees, in the procurement and use of materials required for the performance of this contract, to comply with the provisions of all applicable rules and regulations of the Business and Defense Services Administration, including Defense Materials System regulations.

§ 7.104–19 Cargo preference act.

In accordance with the requirements of § 1.1404 of this subchapter, insert one of the contract clauses set forth therein as appropriate.

§ 7.104–20 Utilization of concerns in labor surplus areas.

Insert the clause set forth below in all fixed-price supply contracts, in amounts exceeding $5,000, except those contracts entered into with foreign contractors which are to be performed outside of the United States, its possessions, and Puerto Rico.

UTILIZATION OF CONCERNS IN LABOR SURPLUS AREAS (OCT. 1960)

It is the policy of the Government to place supply contracts with suppliers who will perform such contracts substantially in areas of persistent or substantial labor surplus where this can be done, consistent with the efficient performance of the contract, at prices no higher than are obtainable elsewhere. The Contractor agrees to use the best efforts to place his subcontracts in accordance with this policy. In complying with the foregoing and with paragraph (b) of the clause of this contract entitled "Utilization of Small Business Concerns," the Contractor in placing his subcontracts shall observe the following order of preference: (i) persistent labor surplus area concerns which are also small business concerns; (ii) other persistent labor surplus area concerns; (iii) substantial labor surplus area concerns which are also small business concerns; (iv) other substantial labor surplus area concerns; and (v) small business concerns which are not labor surplus area concerns.

§ 7.104–21 Limitation on withholding of payments.

(a) Except as provided in paragraph (b) of this section, the following clause shall be inserted in contracts which include more than one clause or Schedule provision authorizing the temporary withholding of amounts otherwise payable to the contractor for supplies delivered or services performed:

LIMITATION ON WITHHOLDING OF PAYMENTS (SEPT. 1958)

If more than one clause or Schedule provision of this contract authorizes the temporary withholding of amounts otherwise payable to the Contractor for supplies delivered or services performed, the total of the amounts so withheld at any one time shall not exceed the greatest amount which may be withheld under any one such clause or Schedule provision at that time: *Provided*, That this limitation shall not apply to:

(1) Withholdings pursuant to any clause relating to wages or hours of employees;

(2) Withholdings not specifically provided for by this contract; and

(3) The recovery of overpayments.

(b) The clause set forth in paragraph (a) of this section is not required where:

(1) The contracting officer or the procuring activity determines that the withholding limitation in the said clause is incompatible with the purpose of the particular withholding provisions involved; or

(2) All of the contract clauses or Schedule provisions (in excess of one) which provide for the withholding of payments either (i) are exempt from the limitations in the clause set forth in paragraph (a) of this section under the proviso thereof, or (ii) provide that their withholding provisions do not require any additional withholdings where the amounts required to be withheld under them is being withheld under other provisions of the contract.

If it is determined that the withholding limitation in the clause set forth in paragraph (a) of this section is incompatible with the purpose of particular withholding provisions, the said clause may be omitted or modified to make it inapplicable to such withholding provisions.

§ 7.104–22 Defense Subcontracting Small Business Program.

In accordance with § 1.707–2(b) of this subchapter insert the following clause:

DEFENSE SUBCONTRACTING SMALL BUSINESS PROGRAM (OCT. 1960)

(a) The Contractor agrees to establish and conduct a program to afford small business concerns an equitable opportunity to compete for Defense subcontracts within their capabilities. In this connection, the Contractor shall:

(i) designate a small business liaison officer, who will (A) maintain liaison with duly authorized representatives of the Government on small business matters, (B) supervise compliance with the clause of this contract entitled Utilization of Small Business Concerns, and (C) administer the Contractor's Small Business Program;

(ii) assure that small business concerns will have an equitable opportunity to compete for subcontracts, particularly by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate small business participation;

(iii) maintain records showing (A) whether each prospective subcontractor is a small business concern; and (B) procedures which have been adopted to comply with the policies set forth in this clause;

(iv) include the "Utilization of Small Business Concerns" clause in subcontracts which offer substantial small business subcontracting opportunities; and

(v) submit DD Form 1140 reports, in triplicate, to the Military Department that reviews his subcontracting program, except that where the Contractor elects to report on a corporate rather than a plant basis, he may submit his reports to the Military Department having industrial readiness planning responsibility at the corporate headquarters.

(b) A "Small business concern" is a concern that:

(i) is independently owned and operated, is not dominant in its field of operations and with its affiliates, employs fewer than 500 employees; or

(ii) is certified as a small business concern by the Small Business Administration.

(c) The Contractor further agrees to insert, in any subcontract hereunder which is in excess of $1,000,000 and which contains the clause entitled "Utilization of Small Business Concerns," provisions which shall conform substantially to the language of this clause, including this paragraph (c); except that a subcontractor will submit the DD Form 1140 reports to the Military Department having industrial readiness planning responsibility or plant cognizance. (A subcontractor may request advice from the nearest military purchasing or contract administration activity as to the Military Department to which he should submit his reports.)

§ 7.104–23 Subcontracts.

In accordance with the requirements of § 3.903–1 of this chapter, insert an appropriate Subcontracts clause.

§ 7.104–24 Government-furnished property.

In accordance with the requirements of § 13.502 of this subchapter, insert the appropriate Government-furnished Property clause.

§ 7.104–25 Special tooling.

In accordance with the requirements of § 13.504 of this subchapter, insert the appropriate Special tooling clause.

§ 7.104–26 Changes to make or buy program.

In accordance with the requirements of § 3.902(d) of this subchapter, insert the clause set forth therein.

§ 7.104–27 Payment for overtime and shift premiums.

In accordance with the requirements of § 12.102 of this chapter, insert the contract clause set forth in §12.102–3(c) of this chapter.

§ 7.104–28 Quality Control System.

In all contracts for complex supplies other than (a) standard commercial items and (b) items being purchased under specifications which in themselves contain adequate inspection and quality control provisions, insert the following clause:

QUALITY CONTROL SYSTEM (JULY 1960)

The Contractor shall provide and maintain a quality control system acceptable to the Government for the supplies covered by this contract. The system of quality control shall be in accordance with Military Specification MIL–Q–9858.

The last sentence of the foregoing clause may be omitted if the application of Military Specification MIL–Q–9858 would be incompatible with the technical objective of the contract, required procurement, management flexibility, or military urgency: *Provided*, That when it is so omitted, the control shall provide by specification, exhibit, or otherwise, that the contractor shall maintain quality control measures for all manufacturing processes and documentation pertinent to quality, testing and inspection, fabrication, and delivery.

§ 7.105 Additional clauses.

The following clauses shall be inserted in fixed-price supply contracts in accordance with Department procedures when it is desired to cover the subject matter thereof in such contracts.

§ 7.105–1 Alterations in contract.

ALTERATIONS IN CONTRACT (JULY 1949)

The following alterations have been made in the provisions of this contract:

§ 7.105–2 Approval of contract.

APPROVAL OF CONTRACT (JULY 1949)

This contract shall be subject to the written approval of ---------- or his duly authorized representative and shall not be binding until so approved.

§ 7.105–4 Notice of shipments.

NOTICE OF SHIPMENTS (JULY 1949)

At the time of delivery of any shipment of supplies to a carrier for transportation, the Contractor shall give prepaid notice of shipment to the consignee establishment, and to such other persons or installations designated by the Contracting Officer, in accordance with instructions of the Contracting Officer. If such instructions have not been received by the Contractor at least 24 hours prior to such delivery to a carrier, the Contractor shall request instructions from the Contracting Officer concerning the notice of shipment to be given.

§ 7.105–5 Liquidated damages.

In accordance with § 1.310, where a liquidated damages provision is to be used in a supply contract, the following provision shall be inserted as paragraph (f) of the Default clause (§ 8.707 of this subchapter) and the present paragraph (f) of that clause shall be redesignated "(g)":

(f) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, or any extension thereof, the actual damage to the Government for the delay will be difficult or impossible to determine. Therefore in lieu of actual damages the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay the amount set forth elsewhere in this contract. Alternatively, the Government may terminate this contract in whole or in part as provided in paragraph (a) of this clause, and in that event the Contractor shall be liable, in addition to the excess costs provided in paragraph (b) above, for such liquidated damages accruing until such time as the Government may reasonably obtain delivery or performance of similar supplies or services. The Contractor shall not be charged with liquidated damages when the delay arises out of causes beyond the control and without the fault or negligence of the Contractor, as defined in paragraph (c) above, and in such event, subject to the "Disputes" clause, the Contracting Officer shall ascertain the facts and extent of the delay and shall extend the time for performance of the contract when in his judgment the findings of fact justify an extension.

§ 7.105–6 Bill of Materials.

A Bill of Materials consists of a report by a supplier which specifies the quantities of various materials required to produce a designated quantity of supplies of a particular kind. A Bill of Materials, with respect to all or part of the supplies to be furnished pursuant to a contract, shall be required only if the Contracting Officer, in accordance with the procedures of the Department concerned, shall determine that such bill is necessary to develop materials or components requirements for production and maintenance programs, for industrial mobilization purposes, or for other specified purposes. In such event, the contract shall specify, with respect to such bill, the following:

(a) The supplies or parts thereof to be covered by the Bill of Materials;

(b) The type of bill or bills (Detailed, Modified, Expanded Summary, or Abbreviated Summary) to be furnished, with applicable instructions;

(c) The compensation to be paid the contractor for furnishing such bill and any revisions thereto, or a statement that the price of the item to which the bill relates includes compensation for the furnishing of such bill;

(d) The number and kind of copies of such bill to be furnished; and,

(e) Delivery dates.

In such event, the contract shall also include the following clause:

BILL OF MATERIALS (APR. 1955)

(a) With respect to the supplies to be delivered pursuant to the contract, for which a Bill of Materials is required, the Contractor shall furnish a Bill of Materials in the required number of copies on Department of Defense Forms 346, and 347 if applicable, or authorized reproductions thereof, in accordance with the instructions specified in the Schedule.

(b) The Contractor shall furnish to the Government, at such intervals as designated in the Schedule, revised pages of the Bill of Materials incorporating the effect of any changes, pursuant to the clause hereof entitled "Changes," in the quantity of any material or part, or any other information contained in the Bill of Materials, or a statement that no revision is necessary. A final revision, or statement that no revision is necessary, shall be furnished upon completion of performance of the contract.

(c) The Bill of Materials and all revisions or statements subsequent thereto shall be subject to inspection and acceptance by the Government.

Where a Bill of Materials is procured by contract separate from the supplies to which such Bill of Materials relates, such contract shall include such of the terms mentioned above as may be appropriate and shall specify that the Bill of Materials shall be furnished on DD Forms 346, and 347 if applicable, or authorized reproductions thereof. The contractor shall not be required to obtain data for the Bill of Materials in greater detail from a subcontractor than he is to furnish under the terms of the above clause.

§ 7.105–7 Material inspection and receiving report.

The following clause may be inserted to the extent authorized by Departmental procedures.

MATERIAL INSPECTION AND RECEIVING REPORT (JULY 1958)

At the time of each delivery under this contract the Contractor shall prepare and furnish to the Government, in the manner and to the extent required by the Contracting Officer, a Material Inspection and Receiving Report (DD Form 250 or comparable form). The Government shall furnish the required forms to the Contractor upon request.

§ 7.105–8 Stop work orders.

(a) *Use of clause.* The clause set forth in paragraph (c) of this section is authorized for use in any negotiated fixed-price type contract under which work stoppage may be required for reasons such as advancements in the state of the art, production or engineering break-throughs, or realignment of programs.

(b) *Use of orders.* (1) Inasmuch as stop work orders may result in increased costs to the Government by reason of standby costs, such orders will be issued only with prior approval at a level above the contracting officer. Generally, use of a stop work order will be limited to those situations where it is advisable to suspend work pending a decision by the Government and a supplemental agreement providing for such suspension is not feasible. Although a stop work order may be used pending a decision to terminate for convenience, it will not be used pending a decision to terminate for default, nor will it be used in lieu of the issuance of a termination notice after a decision to terminate has been made.

(2) Stop work orders should include (i) a clear description of the work to be suspended, (ii) instructions as to the issuance of further orders by the contractor for material or services, (iii) guidance as to action to be taken on subcontracts, and (iv) other suggestions to the contractor for minimizing costs. Promptly, after issuance, stop work orders should be discussed with the contractor and should be modified, if necessary, in the light of such discussions.

(3) As soon as feasible after a stop work order is issued, (i) the contract will be terminated; or (ii) the stop work order will either be canceled or—if necessary and if the contractor agrees—be extended beyond the period specified in the order. In any event, this must be done before the specified stop work period expires. Where an extension of the stop work order is necessary, it shall

be evidenced by a supplemental agreement. Any cancellation of a stop work order shall be subject to the same approvals as were required for the issuance of the order.

(c) *Clause.*

STOP WORK ORDER (JULY 1960)

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of ninety (90)* days after the order is delivered to the Contractor, and for any further period to which the parties may agree. Any such order shall be specifically identified as a Stop Work Order issued pursuant to this clause. Upon receipt of such an order, the Contractor shall forthwith comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of ninety (90)* days after a stop work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either—

(i) cancel the stop work order, or

(ii) terminate the work covered by such order as provided in the "Termination for Convenience" clause of this contract.

(b) If a stop work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. An equitable adjustment shall be made in the delivery schedule or contract price, or both, and the contract shall be modified in writing accordingly, if—

(i) the stop work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract, and

(ii) the Contractor asserts a claim for such adjustment within thirty (30) days after the end of the period of work stoppage; provided that, if the Contracting Officer decides the facts justify such action, he may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the "Disputes" clause of this contract.

(c) If a stop work order is not canceled and the work covered by such order is terminated for the convenience of the Government, the reasonable costs resulting from the stop work order shall be allowed in arriving at the termination settlement.

*The clause may provide for less than ninety days.

§ 7.106 Price escalation clauses (established prices).

This section sets forth uniform clauses for use when it is desired to provide for price escalation in the event of changes in the contractor's established prices. Each clause is preceded by a statement of the conditions under which it may be used.

§ 7.106–1 Escalation clause for basic steel, aluminum, brass, bronze or copper mill products.

The following price escalation clause is authorized for use in advertised or negotiated fixed-price supply contracts for basic steel, aluminum, brass, bronze or copper mill products, such as sheets, plates and bars, when an established price exists for the particular supply being procured. The percentage figure to be used in paragraph (d)(3) of the clause shall not exceed 10 percent.

PRICE ESCALATION (FEB. 1958)

(a) The Contractor warrants that the unit prices stated herein, excluding any part of the prices which reflects requirements for preservation, packaging and packing, beyond standard commercial practice, are not in excess of the Contractor's applicable established prices in effect on the date set for opening of bids (or the contract date, if this is a negotiated contract rather than one entered into by means of formal advertising) for like quantities of the supplies covered by this contract.

(b) The Contractor shall promptly notify the Contracting Officer as to the amount and effective date of each decrease in any established price, and each applicable unit price shall be decreased by the amount of the decrease in the applicable established price. Any such decrease in a unit price shall apply to those supplies delivered on and after the effective date of each applicable decrease in the Contractor's established price, and this contract shall be amended accordingly. The Contractor shall certify on each invoice submitted under the contract that each unit price stated therein reflects all decreases, if any, which the Contractor had made in the established price applicable thereto, since the date set for opening of bids (or the contract date, if this is a negotiated contract rather than one entered into by formal advertising), or shall certify on the final invoice that all such decreases have been applied to supplies delivered on and after the effective date of each such decrease in the Contractor's established prices.

(c) The Contractor may from time to time after the date of this contract and during the performance hereof, by written notice to the Contracting Officer, request an upward adjustment in any of the contract unit prices to be effective as of a date to be specified by the Contractor. Such request shall be acted upon in accordance with the following provisions of this clause.

(d) An upward adjustment in a contract unit price may be made under this clause only in accordance with the following conditions:

(1) Such an upward adjustment shall be made only if the Contractor's applicable established price has increased subsequent to the date set for opening of bids (or the contract date, if this is a negotiated contract rather than one entered into by means of formal advertising).

(2) No unit price shall be increased by an amount greater than the amount of the increase in the Contractor's applicable established price.

(3) The aggregate of the increases in any unit price made under this clause shall not exceed _____ percent of the original applicable contract unit price.

(4) No adjusted unit price shall be effective earlier than the effective date of the increase in the applicable established price, but if the Contractor's request for adjustment is received by the Contracting Officer more than ten days after the effective date of the increase in the Contractor's applicable rate, no adjusted unit price shall be effective earlier than the date of receipt by the Contracting Officer of such request.

(5) No upward adjustment in unit prices hereunder shall apply to supplies which were required by the contract delivery schedule to be delivered prior to the effective date of the related increase in the applicable established price, unless the Contractor's failure to deliver supplies in accordance with the delivery schedule results from causes beyond the control and without the fault or negligence of the Contractor, within the meaning of paragraph (c) of the clause of this contract entitled "Default," in which case the contract shall be amended to make an equitable extension of the delivery schedule.

(e) In the event the requested upward adjustment in any contract unit price is acceptable to the Contracting Officer, he shall so notify the Contractor, and the contract shall be amended accordingly. In the event the requested upward adjustment is not acceptable to the Contracting Officer, or if the Contracting Officer does not reach an agreement with the Contractor with respect to a price increase, the Contracting Officer may, within 30 days after receipt of the Contractor's request, cancel without liability to either party the Contractor's right to proceed with performance of that portion of the contract which is undelivered at the time of such cancellation, except that the Contractor may make delivery of all or any of the supplies which a duly authorized officer of the company shall certify were completed or in the process of manufacture at the time of receipt of notice of such cancellation. In such event the Government shall pay for all supplies so delivered at the applicable unit price contained in the Contractor's request, and the contract shall be amended accordingly; provided, that such certification is made within 10 days after receipt of notice of such cancellation, and provided further that such requested increase satisfies all of the conditions and does not exceed the limitations of paragraph (d). In the event this contract is for standard steel supplies, they shall be deemed to be in the process of manufacture when the steel therefor is in any state of processing after the beginning of the furnace melt.

(f) During the period after the Contractor has requested an upward adjustment, and prior to an agreement between the parties with respect to the request or cancellation of the contract pursuant to paragraph (e), the Contractor shall continue deliveries according to the terms of the contract. The Contractor shall be paid for such deliveries at the applicable increased unit prices as requested, provided that such requested increases satisfy all the conditions and do not exceed the limitations of paragraph (d), and provided further that if the parties agree on an increase less than that requested, payments previously made at the requested amount shall be adjusted accordingly. If the Contracting Officer neither reaches an agreement with the Contractor on the requested adjustment, nor cancels the contract, the Contractor shall continue deliveries according to the terms of the contract, and the Contractor shall be paid therefor at the applicable increased unit prices as requested, provided that such requested increases satisfy all the conditions and do not exceed the limitations of paragraph (d).

§ 7.106–2 Escalation clause for nonstandard steel items.

The following price escalation clause is authorized for use in advertised or in negotiated fixed-price supply contracts when:

(a) The contractor is a steel producer and actually manufactures the standard steel mill item referred to in paragraph (d) of the clause; and

(b) The items being procured are nonstandard steel items made wholly or in major part of standard steel mill items. When this clause is included in invitations for bids, Note (8) is inapplicable and shall be omitted. Invitations for bids or requests for proposals shall instruct bidders or offerors, as appropriate, to complete all blanks in accordance with the applicable notes.

PRICE ESCALATION (MAR. 1958)

(a) The Contractor represents that the unit prices set forth in this contract do not include any contingency allowance to cover the possibility of increased costs of performance resulting from increases in either (i) the Contractor's rates of pay for labor employed by it, or (ii) the prices which the Contractor charges its manufacturing shops for the steel required in the performance of this contract.

(b) Each contract unit price shall be subject to revision, pursuant to the provisions of this clause, to reflect changes in the cost of labor and steel. For the purpose of any such price revision, the proportion of the contract unit price attributable to costs of labor not otherwise included in the price of the steel item identified in paragraph (d) below shall be ------ percent, and the proportion of the contract unit price attributable to the cost of steel shall be ------ percent. [See Note (1).]

(c) For the purposes of this paragraph, the term "labor index" shall mean the average straight time hourly earnings of the Contractor's employees in the ---------- shop of the Contractor's ---------- plant [see Note (2)] for any particular month. The word "month" as used herein means "calendar month"; *provided,* however, that if the Contractor's accounting period does not coincide with the calendar month, then such accounting period shall be used throughout the clause in lieu of "month." Unless otherwise specified in this contract, the labor index shall be computed by dividing the total straight time earnings of the Contractor's employees in the particular shop identified above for any given month by the total number of straight time hours worked by such employees in that month. Any revision in a contract unit price to reflect changes in the cost of labor shall be computed solely by reference to the "base labor index," which shall be the average of the labor indices for the three months consisting of the month of ----------, 19--, [see Note (3)] the month immediately preceding and the month immediately following, and to the "current labor index," which shall be the average of the labor indices for the month in which delivery of supplies is required to be made in accordance with the terms of this contract and the month preceding.

(d) Any revision in a contract unit price to reflect changes in the cost of steel shall be computed solely by reference to the "base steel index," which shall be the Contractor's established or published price to the public [see Note (8)] including all applicable extras of $------ per ------ [see Note (4)] for ---------- [see Note (5)] on ------, 19-- [see Note (6)] and the "current steel index," which shall be the Contractor's established or published price to the public [see Note (8)] of said item including all applicable extras in effect ------ days [see Note (7)] prior to the first day of the month in which delivery of supplies is required to be made in accordance with the terms of the contract.

(e) Each contract unit price shall be revised for each month in which, by the terms of this contract, delivery of supplies is required to be made, and such revised contract unit price shall apply to the deliveries of those quantities of supplies required to be made in that month regardless of when actual delivery be made of said quantities of supplies. Each revised contract unit price for any month shall be computed by adding together the following three amounts: (i) the amount (representing the adjusted cost of labor) obtained by multiplying ------ percent of the contract unit price by a fraction, the numerator of which shall be the current labor index and the denominator of which shall be the base labor index; (ii) the amount (representing the adjusted cost of steel) obtained by multiplying ------ percent of the contract unit price by a fraction, the numerator of which shall be the current steel index and the denominator of which shall be the base steel index; and (iii) the amount equal to ------ percent of the original contract unit price (representing that portion of such unit price which relates neither to the cost of labor nor to the cost of steel and which is therefore not subject to revision); [see Note (1)]: *Provided, however,* That any revised contract unit price made pursuant to the provisions of this clause shall in no event exceed 110 percent of the original contract unit price. All computations shall be made to the nearest one-hundredth of one cent.

(f) Pending revisions of the contract unit prices, if any, to be made pursuant to this clause, the Contractor shall be paid the contract unit prices for deliveries made. Within thirty days after the final delivery of supplies, or within such further period of time as may be authorized by the Contracting Officer, the Contractor shall furnish a statement setting forth and certifying the correctness of (i) the average straight time hourly earnings of the Contractor's employees in the shop of the Contractor identified in paragraph (c) above which earnings are relevant to the computations of the "base labor index" and the "current labor index," and (ii) the Contractor's established or published prices to the public [see Note (8)] including all applicable extras, for like quantities of the item identified in paragraph (d) above, which prices are relevant to the computation of the "base steel index" and the "current steel index." Upon request of the Contracting Officer or his duly authorized representative, the Contractor shall make available its records used in the computation of the labor indices. After the receipt of such certificate by the Contracting Officer, the revised contract unit prices shall be computed in accordance with the provisions of this clause, and this contract shall be amended accordingly.

(g) In the event of any total or partial termination of any item of this contract for the convenience of the Government, the month in which notice of such termination is received by the Contractor, if prior to the month in which delivery is required by this contract, shall be considered the month in which delivery of such terminated or partially terminated item is required for the purpose of determining the current labor and materials indices under paragraphs (c) and (d) hereof: *Provided, however,* That as to the quantity of such item which is not terminated for convenience, the month in which delivery is required by this contract shall continue to apply for determining said indices. In the case of termination of any item for default on the part of the Contractor, any price revision shall be limited to the quantity of each item which has been delivered by the Contractor and accepted by the Government prior to receipt by the Contractor of notice of termination for default.

(h) As used in this clause the phrase "the month in which delivery of supplies is required to be made in accordance with the terms of this contract" shall mean any month in which under the terms of this contract a specific quantity of units of the supplies called for by this contract is required to be delivered: *Provided, however,* That in case the failure of the Contractor to make delivery of such quantity shall have arisen out of causes beyond the control and without the fault or negligence of the Contractor, within the meaning of paragraph (c) of the clause of this contract entitled "Default," the quantity not delivered shall be required to be delivered as promptly as possible after the cessation of the cause of such failure, and the delivery schedule set forth in this contract shall be amended accordingly.

(i) Failure to agree upon any determination to be made under this clause shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

Notes

(1) Bidder insert the same percentage figures for the corresponding blanks in paragraphs (b) and in (e) (i) and (ii). In paragraph (e) (iii), bidder insert the percentage representing the difference between the sum of the percentages inserted in paragraph (b) and 100 percent.

(2) Bidder identify the shop and plant in which the standard steel mill item identified in paragraph (d) will be finally fabricated or processed into the contract item.

(3) Bidder insert the month of bid opening, or the month in which the Contractor submitted its proposal if this is a negotiated contract.

(4) Bidder insert the unit price and unit of measure of the standard steel mill item used by the Contractor in the manufacture of the contract item.

(5) Bidder identify the standard steel mill item used by the Contractor in the manufacture of the contract item.

(6) Bidder insert the date set for bid opening, or the date of the Contractor's quotation if this is a negotiated contract.

(7) Bidder insert the number of days which represents the Contractor's best estimate of the period of time required for processing the standard steel mill item in the shop identified in paragraph (c).

(8) In negotiated procurements of nonstandard steel items, when there is no established or published price to the public, or when it is not desirable to use such price, this paragraph may refer to another appropriate price basis, such as an established interplant price.

§ 7.106–3 Escalation clause for standard supplies.

The following price escalation clause is authorized for use in negotiated fixed-price supply contracts for standard supplies for which established prices exist. The clause may be used only when the total contract price is over $5,000 and delivery is not to be completed within six months after the contract date. The percentage figure to be used in subparagraph (d) (3) of the clause shall not exceed 10 percent. If any standard trade discounts offered by the contractor against its list or catalog price are taken into account in negotiating the contract unit price, the Contracting Officer's file should contain a statement setting forth the list or catalog price and the discounts. The discounts referred to do not include prompt payment or cash discounts.

PRICE ESCALATION (MAY 1957)

(a) The Contractor warrants that the unit prices stated herein, excluding any part of the prices which reflects requirements for preservation, packaging, and packing beyond standard commercial practice, are not in excess of the Contractor's applicable established prices in effect on the contract date for like quantities of the supplies covered by this contract. The term "established price" as used in this clause is the net price after applying any applicable standard trade discounts offered by the Contractor from its list or catalog price.

(b) The Contractor shall promptly notify the Contracting Officer as to the amount and effective date of each decrease in any applicable established price, and each applicable contract unit price shall be decreased by the same percentage that the applicable established price is decreased. Any such decrease in a unit price shall apply to those supplies delivered on and after the effective

date of each applicable decrease in the Contractor's established price, and this contract shall be amended accordingly. The Contractor shall certify on each invoice submitted under the contract that each unit price stated therein reflects all decreases, if any, which the Contractor had made in the established price applicable thereto, since the contract date; or shall certify on the final invoice that all such decreases have been applied to supplies delivered on and after the effective date of each such decrease in the Contractor's established prices.

(c) The Contractor may from time to time after the date of this contract and during the performance hereof, by written notice to the Contracting Officer, request an upward adjustment in any of the contract unit prices to be effective as of a date to be specified by the Contractor. Such request shall be acted upon in accordance with the following provisions of this clause.

(d) An upward adjustment in a contract unit price may be made under this clause only in accordance with the following conditions:

(1) Such an upward adjustment shall be made only if the Contractor's applicable established price has increased subsequent to the contract date.

(2) No unit price shall be increased by a percentage greater than the percentage increase in the Contractor's applicable established price.

(3) The aggregate of the increases in any unit price made under this clause shall not exceed _____ percent of the original applicable contract unit price.

(4) No adjusted unit price shall be effective earlier than the effective date of the increase in the applicable established price, or the date of receipt by the Contracting Officer of the Contractor's request for adjustment, whichever is the later.

(5) No upward adjustment in unit prices hereunder shall apply to supplies which were required by the contract delivery schedule to be delivered prior to the effective date of the related increase in the applicable established price, unless the Contractor's failure to deliver supplies in accordance with the delivery schedule results from causes beyond the control and without the fault or negligence of the Contractor, within the meaning of paragraph (c) of the clause of this contract entitled "Default," in which case the contract shall be amended to make an equitable extension of the delivery schedule.

(e) In the event the requested upward adjustment in any contract unit price is acceptable to the Contracting Officer, he shall so notify the Contractor, and the contract shall be amended accordingly. In the event the requested upward adjustment is not acceptable to the Contracting Officer, or if the Contracting Officer does not reach an agreement with the Contractor with respect to a price increase, the Contracting Officer may, within 30 days after receipt of the Contractor's request, cancel without liability to either party the Contractor's right to proceed with performance of that portion of the contract which is undelivered at the time of such cancellation.

(f) During the period after the Contractor has requested an upward adjustment, and prior to an agreement between the parties with respect to the request, or cancellation of the contract pursuant to paragraph (e), the Contractor shall continue deliveries according to the terms of the contract. The Contractor shall be paid for such deliveries at the applicable increased unit prices as requested, provided that such requested increases satisfy all the conditions and do not exceed the limitations of paragraph (d), and provided further that if the parties agree on an increase less than that requested, payments previously made at the requested amount shall be adjusted accordingly. If the Contracting Officer neither reaches an agreement with the Contractor on the requested adjustment, nor cancels the contract, the Contractor shall continue deliveries according to the terms of the contract, and the Contractor shall be paid therefor at the applicable increased unit prices as requested, provided that such requested increases satisfy all the conditions and do not exceed the limitations of paragraph (d).

§ 7.106–4 Escalation clause for semistandard supplies.

The following price escalation clause is authorized for use in negotiated fixed-price supply contracts for semistandard supplies, the prices of which can be reasonably related to the prices of nearly equivalent standard supplies for which established prices exist. The clause may be used only when the total contract price is over $5,000 and delivery is not to be completed within six months after the contract date. A clear understanding should be set forth in writing prior to making the contract as to the identity of the standard supply items which are applicable. The percentage figure to be used in subparagraph (d)(3) of the clause shall not exceed 10 percent. If any standard trade discounts offered by the Contractor against its list or catalog price are taken into account in negotiating the contract unit price, the Contracting Officer's file should contain a statement setting forth the list or catalog price and the discounts. The discounts referred to do not include prompt payment or cash discounts. When the supplies being purchased are standard supplies in all respects except for preservation, packaging, and packing requirements, the following clause should not be used; in such cases the Escalation Clause for Standard Supplies, in § 7.106–3, is the appropriate clause.

PRICE ESCALATION (MAY 1957)

(a) The Contractor warrants that the supplies covered by this contract are supplies which the Contractor customarily offers for sale commercially, except for modifications in accordance with the specifications of this contract, and that as of the contract date any differences between the unit prices stated herein and the Contractor's established prices for like quantities of the supplies which are the nearest commercial equivalents of the supplies covered by this contract (herein referred to as "the established prices") are due to compliance with such specifications, and to compliance with any requirements which this contract may contain for preservation, packaging, and packing beyond standard commercial practice. The term "established price" as used in this clause is the net price after applying any applicable standard trade discounts offered by the Contractor from its list or catalog price.

(b) The Contractor shall promptly notify the Contracting Officer as to the amount and effective date of each decrease in any applicable established price, and each applicable contract unit price shall be decreased by the same percentage that the applicable established price is decreased. Any such decrease in a unit price shall apply to those supplies delivered on and after the effective date of each applicable decrease in the Contractor's established price, and this contract shall be amended accordingly. The Contractor shall certify on each invoice submitted under the contract that each unit price stated therein reflects all decreases, if any, which the Contractor had made in the established price applicable thereto, since the contract date, or shall certify on the final invoice that all such decreases have been applied to supplies delivered on and after the effective date of each such decrease in the Contractor's established prices.

(c) The Contractor may from time to time after the date of this contract and during the performance hereof, by written notice to the Contracting Officer, request an upward adjustment in any of the contract unit prices to be effective as of a date to be specified by the Contractor. Such request shall be acted upon in accordance with the following provisions of this clause.

(d) An upward adjustment in a contract unit price may be made under this clause only in accordance with the following conditions:

(1) Such an upward adjustment shall be made only if the Contractor's applicable established price has increased subsequent to the contract date.

(2) No unit price shall be increased by a percentage greater than the percentage increase in the Contractor's applicable established price.

(3) The aggregate of the increases in any unit price made under this clause shall not exceed _____ percent of the original applicable contract unit price.

(4) No adjusted unit price shall be effective earlier than the effective date of the increase in the applicable established price, or the date of receipt by the Contracting Officer of the Contractor's request for adjustment, whichever is the later.

(5) No upward adjustment in unit prices hereunder shall apply to supplies which were required by the contract delivery schedule to be delivered prior to the effective date of the related increase in the applicable established price, unless the Contractor's failure to deliver supplies in accordance with the delivery schedule results from causes beyond the control and without the fault or negligence of the Contractor, within the meaning of paragraph (b) of the clause of this contract entitled "Default," in which case the contract shall be amended to make an equitable extension of the delivery schedule.

(e) In the event the requested upward adjustment in any contract unit price is acceptable to the Contracting Officer, he shall so notify the Contractor, and the contract shall be amended accordingly. In the event the requested upward adjustment is not acceptable to the Contracting Officer, or if the Contracting Officer does not reach an agreement with the Contractor with respect to a price increase, the Contracting Officer may, pursuant to the clause of the contract entitled "Termination for Convenience of the Government," terminate the Contractor's right to proceed with performance of that portion of the contract which is undelivered at the time of such termination.

(f) During the period after the Contractor has requested an upward adjustment, and prior to an agreement between the parties with respect to the request, or termination of the contract pursuant to paragraph (e), the Contractor shall continue deliveries according to the terms of the contract. The Contractor shall be paid for such deliveries at the applicable increased unit prices as requested, provided that such requested increases satisfy all the conditions and do not exceed the limitations of paragraph (d), and provided further that if the parties agree on an increase less than that requested, payments previously made at the requested amount shall be adjusted accordingly. If the Contracting Officer either reaches an agreement with the Contractor on the requested adjustment, nor terminates the contract, the Contractor shall continue deliveries according to the terms of the contract, and the Contractor shall be paid therefor at the applicable increased unit prices as re-

quested, provided that such requested increases satisfy all the conditions and do not exceed the limitations of paragraph (d).

§ 7.107 Price escalation clause (labor and material).

(a) The following price escalation clause is authorized for use in negotiated fixed-price supply contracts where (1) the price exceeds $50,000, (2) the period of performance exceeds six months, (3) there is no major element of design engineering or developmental work involved in producing the items being procured, and (4) one or more identifiable labor or material cost factors are subject to change.

(b) The Schedule shall describe in detail the types of labor and materials subject to escalation, the labor rates (including fringe benefits, if any), and unit prices of materials, which may be increased or decreased, and the quantities of labor and specified materials allocable to each unit of supplies to be delivered under the contract. The following sample format illustrates a type of schedule description that may be used:

The following types of labor and material are subject to price escalation pursuant to clause ____ of this contract.

CONTRACT ITEM NO. 1

Types of labor and materials	*Rates of pay and material prices*	*Quantities and direct costs per unit of procurement*
Drill Press Operator.	$3.00/hour, no fringe benefits included.	20 min—$1.00.
Welder	$2.75/hour .05/hour—vacation pay .20/hour—pension plan	
	$3.00	
Copper Sheet	$0.40/lb.	10 min.—$0.50. 2 lb.—$0.80.
Purchased parts:		
(1) ABC tube X5721.	$1.00 each	3 ea.—$3.00.
(2) XYZ part No. 9348.	$0.50 each	10 ea.—$5.00.

The percentage figure to be used in subparagraph (d) (vi) of the clause shall not exceed 10 percent.

(c) In negotiating adjustments under the clause, the contracting officer shall consider work in process and materials on hand at the time of changes in labor rates or materials prices since these elements may have a significant impact on equitable price adjustments.

PRICE ESCALATION (JAN. 1958)

(a) The Contractor warrants that the prices set forth in this contract do not include any allowance for any contingency to cover increased costs of performance resulting from increases (i) the Contractor's rates of pay for labor or (ii) the unit prices for materials, set forth in the Schedule.

(b) If at any time during the performance of this contract there is an increase or decrease in the rates of pay for labor or unit prices for materials set forth in the Schedule, the Contractor shall notify the Contracting Officer thereof within 60 days of such increase or decrease or within such further period as may be approved in writing by the Contracting Officer, but in any event not later than final payment under the contract. Such notice shall include the Contractor's proposal for an equitable adjustment in the contract unit prices to be negotiated in accordance with paragraph (c) below and shall be accompanied by data, in such form as the Contracting Officer may require, explaining (i) the causes, (ii) the effective date, and (iii) the amount, both of the increase or decrease and of the Contractor's proposal for an equitable adjustment.

(c) Promptly upon receipt of any notice and data described in (b) above, the Contractor and the Contracting Officer shall negotiate an equitable adjustment, and the effective date thereof, in the contract unit prices to reflect any change in the cost of performance of this contract due to the increase or decrease in rates of pay for labor or unit prices for materials set forth in the Schedule: *Provided, however,* That such negotiations may be postponed by the Contracting Officer until an accumulation of such increases and decreases results in an adjustment allowable under (d) (v). The equitable adjustment and the effective date thereof, shall be set forth in an amendment or supplemental agreement to this contract. Such amendment or supplemental agreement shall also revise the rates of pay for labor or unit prices for materials set forth in the Schedule to reflect the increase or decrease therein. Failure of the parties to agree to an adjustment under this clause shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." Pending agreement on, or determination of, any such adjustment and its effective date, the Contractor shall continue performance.

(d) Notwithstanding any other provision of this clause, any price adjustment under this clause shall be subject to the following limitations:

(i) There shall be no adjustment for supplies whose production cost is not affected by a change in the rates of pay for labor or unit prices for materials set forth in the Schedule;

(ii) There shall be no adjustment other than for increases or decreases in the rates of pay for labor or unit prices for materials set forth in the Schedule;

(iii) There shall be no adjustment for any increase or decrease in the quantities of labor or materials set forth in the Schedule for each item to be delivered hereunder;

(iv) No upward adjustment shall apply to supplies which were required by the contract delivery schedule to be delivered prior to the effective date of the adjustment, unless the Contractor's failure to deliver supplies in accordance with the delivery schedule results from causes beyond the control and without the fault or negligence of the Contractor within the meaning of the clause of this contract entitled "Default," in which case the contract shall be amended to make an equitable extension of the delivery schedule;

(v) Except as provided in (e) below, there shall be no adjustment for any change in rates of pay for labor or unit prices for materials which would not result in a net change of at least three percent of the then current total contract price; and

(vi) There shall be no adjustment upward which would cause any adjusted contract unit price to exceed ------ percent of the corresponding original contract unit price.

(e) If, after delivery of the last unit called for by this contract, either party requests negotiation pursuant to (c) above, the limitations of (d) (v) shall not apply.

(f) The final invoice submitted under this contract shall include a certification that the Contractor has not experienced a decrease in rates of pay for labor or unit prices for materials set forth in the Schedule or that it has given notice of all such decreases in compliance with (b) above.

(g) The Contracting Officer may examine the Contractor's books, records, and other supporting data relevant to the costs of labor and materials during all reasonable times until three years after final payment under this contract.

§ 7.108 Incentive price revision clause.

When in accordance with the provisions of Part 3, Subpart D of this title, the fixed-price incentive contract described in § 3.403–4 (a) (2) is to be used, the following clause shall be made a part of the contract. As to each item, which is to be subject to incentive price revision, the contract schedule shall set forth the target cost, target profit, and target price. Subparagraph (d) (2) of the following clause may be modified to provide, within the price ceiling, for a ceiling, a floor, or both on the final profit.

INCENTIVE PRICE REVISION (JULY 1960)

(a) *Definitions.* As used in this clause, the following terms shall have the meanings set forth below:

(1) The term "target price" means the unit price of any supplies or services under this contract, which is subject to adjustment in accordance with this clause, and is composed of "target cost" and "target profit".

(2) The term "target cost" means that part of the target price which, at the time of its negotiation, was agreed to as the estimate of the unit cost of the supplies or services being procured.

(3) The term "target profit" means that part of the target price which, at the time of its negotiation, was agreed to as the unit profit for furnishing the supplies or services at a cost equal to the target cost.

(4) The term "total target price" means the sum of the target prices.

(5) The term "total target cost" means the sum of the target costs.

(6) The term "total target profit" means the sum of the target profits.

(7) The term "total adjusted cost" means the final negotiated cost of all supplies or services which are subject to price revision under this clause.

(8) The term "total adjusted price" means the final contract price, as computed in accordance with this clause, for all supplies or services which are subject to price revision under this clause.

(b) *General.* The supplies or services identified in the Schedule as Items ------ are subject to price revision in accordance with the provisions of this clause: *Provided,* That in no event shall the total adjusted price of such Items exceed ------ percent (------ percent) of the total target cost. Any supplies or services which are to be ordered separately under, or otherwise added to, this contract, and which are to be subject to price revision in accordance with the provisions of this clause, shall be identified as such in a modification to this contract.

(c) *Submission of data.* Within ------ (------) days after the end of the month in which the Contractor has delivered the last unit of supplies and completed the services called for by those Items listed in paragraph (b) above, the Contractor shall submit in such form as the Contracting Officer may require, (i) a detailed statement of all costs incurred up to the end of that month in performing all work under such Items, and (ii) an estimate of costs of such further performance, if any, as may be necessary to complete performance of all work with respect to such Items.

(d) *Price revision.* Upon submission of the data required by paragraph (c) above, the Contractor and the Contracting Officer shall promptly establish the total adjusted price in accordance with the following:

(1) On the basis of the information required by paragraph (c) above, together with any other pertinent information, there shall be established by negotiation the total ad-

justed cost reasonably incurred or to be incurred for and properly allocable to the supplies delivered (or services performed) and accepted by the Government, which are subject to price revision under this clause.

(2) The total adjusted price shall be established by adding to the total adjusted cost an allowance for profit determined as follows:

When the total adjusted cost is—	*The allowance for profit is—*
Equal to the total target cost.....	Total target profit.
Greater than the total target cost..	Total target profit less .. percent (..%) of the amount by which the total adjusted cost exceeds the total target cost.
Less than the total target cost.....	Total target profit plus .. percent (..%) of the amount by which the total adjusted cost is less than the total target cost.

(e) *Records.* (1) The Contractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. The Contractor shall segregate the costs of any supplies or services for which the price is fixed and not subject to revision under this clause. Each subcontract placed by the Contractor hereunder on other than a firm fixed-price basis in connection with the furnishing of the supplies or services identified in paragraph (b) above as being subject to price revision (i) shall provide that the subcontractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred in the performance of such subcontract and (ii) shall require each such subcontractor to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts which are on other than a firm fixed-price basis.

(2) The Government may at all reasonable times make such examination or audit as the Contracting Officer may require of the Contractor's books, records, documents, and other evidence, pertinent to the performance of this contract.

(f) *Certification.* An authorized responsible official of the Contractor shall certify on each statement of costs submitted to the Contracting Officer pursuant to (c) above that the incurred costs are based upon records of the Contractor, that such records reflect generally accepted accounting principles and practices normally followed by the Contractor, that such costs are correct to the best of his knowledge and belief, and that the accompanying estimate of costs to complete is considered reasonable.

(g) *Subcontracts.* (1) No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis; and the Contractor shall not, without the prior written consent of the Contracting Officer, place any subcontract which is on a cost-plus-a-fee basis and which would involve a total price in excess of $10,000, including the fee. The Contracting Officer may, in his discretion, ratify in writing any such cost-plus-a-fee subcontract and such action shall constitute the consent of the Contracting Officer as required by this subparagraph (1).

(2) Each subcontract placed by the Contractor hereunder (i) shall provide that the Government may at all reasonable times make such examination or audit as the Contracting Officer may require of the subcontractor's books, records, documents, and other evidence, pertinent to the performance of the subcontract, and (ii) shall require each such subcontractor whose subcontract is on other than a firm fixed-price basis to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts. The term "subcontract," as used in this subparagraph (2) only, excludes firm fixed-price subcontracts not in excess of $2,500 and subcontracts for utility services at rates established for uniform application to the general public.

(h) *Contract modifications.* The total adjusted price, as determined in accordance with paragraph (d) above, shall be evidenced by a modification to this contract signed by the Contractor and the Contracting Officer and shall apply to supplies delivered and to services performed under this contract.

(i) *Adjustment of payments.* Pending execution of the contract modification referred to in paragraph (h) above, the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be the target prices set forth in this contract: *Provided,* That if at any time it appears that the then current billing prices do not provide for payments consistent with the provisions of subparagraph (j) (3) below, the parties may agree to revised billing prices, which shall be reflected in a modification to this contract. Billing prices are for the sole purpose of providing for interim payments and shall not affect the determination of the total adjusted price under paragraph (d) above. After execution of the contract modification referred to in paragraph (h) above, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the total adjusted price and any additional payments, refunds, or credits, resulting therefrom shall be promptly made.

(j) *Limitation on payments.* (1) This paragraph (j) shall not apply after final price revision to the full extent permitted by this contract.

(2) Within forty-five (45) days after the end of each quarter of the Contractor's fiscal year, beginning for the quarter in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and as of the end of each quarter, the Contractor shall submit to----------* a cumulative statement setting forth:

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for and properly allocable solely to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established;

(iii) That portion of the total target profit which is in direct proportion to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established, increased or decreased in accordance with the incentive profit formula set forth in (d) (2) above when the amount of costs stated under (ii) above differs from the aggregate target costs of such supplies or services; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(3) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount of (2) (iv) above exceeds the sum of (2) (i), (ii), and (iii) above, the Contractor shall immediately refund or credit to the Government against existing unpaid invoices or vouchers covered by such statement the amount of such excess less (i) the cumulative total of any previous refunds or credits under this clause (exclusive of any tax credits under Section 1481 of the Internal Revenue Code of 1954) and (ii) any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954. If any portion of such excess has been applied to the liquidation of progress payments, such amount (less all tax credits under the Internal Revenue Code) may be added or restored to the unliquidated progress payment account, to the extent consistent with the progress payments clause of this contract, instead of direct refund thereof.

(4) The Contractor shall (i) insert in each price redetermination or incentive price revision subcontract hereunder the substance of this "Limitation on Payments" provision, including this subparagraph (4), modified to omit mention of the Government and reflect the position of the Contractor as purchaser and of the subcontractor as vendor, and to omit that portion of subparagraph (3) relating to tax credits, and (ii) include in each cost-reimbursement type subcontract hereunder a requirement that each price redetermination and incentive price revision subcontract thereunder will contain the substance of this "Limitation on Payments" provision, including this subparagraph (4) modified as outlined in (i) above.

(k) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon the total adjusted price within 60 days after the date on which the data required by (c) above are to be submitted, or within such further time as may be specified by the Contracting Officer, such failure to agree shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes," and the Contracting Officer shall promptly issue a decision thereunder.

(l) *Termination.* If this contract is terminated prior to establishment of the total adjusted price, prices of supplies or services subject to price revision under this clause shall be established pursuant to this clause for (i) completed supplies accepted by the Government and services performed and accepted by the Government, and (ii) in the event of a partial termination, supplies and services which are not terminated. All other elements of the termination shall be resolved pursuant to other applicable provisions of this contract.

In the foregoing clause, in the space designated by an asterisk (----------*), insert, in contracts of the Department of the Army and the Department of the Air Force, the words "the Contracting Officer," and insert, in contracts of the Department of the Navy, the office or offices prescribed by Departmental procedures.

In the event the contract calls for spare parts or other supplies or services, which are to be ordered under a provisioning document or Government option, and the prices of such supplies or services are to be made subject to incentive price revision in accordance with the above clause, the following provision (m) shall be included in such clause:

(m) *Spare parts.* Spare parts, other supplies, or services, which are to be furnished under this contract pursuant to a provisioning document or Government option, shall be subject to price revision in accordance with the provisions of this clause, and any prices established for such spare parts, other supplies, or services, pursuant to such provisioning document or Government option, shall be deemed to be target prices. Target cost and profit covering such spare parts, other supplies, or services may be established

either separately, in the aggregate, or in any combination thereof, as the parties may agree.

§ 7.109 Price redetermination clauses.

§ 7.109–1 General.

When it is determined, in accordance with § 3.402, to use a fixed-price contract providing for redetermination of price as described in § 3.403–3, the applicable clause of those set forth below shall be used.

§ 7.109–2 Prospective periodic price redetermination at stated intervals.

(a) *Description; applicability, and limitations.* See § 3.403–3(b)(1).

(b) *Clause.*

PRICE REDETERMINATION (TYPE A)
(JULY 1960)

(a) *General.* The unit prices and the total price set forth in this contract shall be periodically redetermined in accordance with the provisions of this clause.[1] The prices for supplies delivered and services performed prior to the first effective date of price redetermination shall remain fixed.

(b) *Price redetermination periods.* For the purpose of price redetermination the performance of this contract is divided into successive periods. The first period shall extend from the date of this contract to ----------,[2] and the second and each succeeding period shall extend for ------ (------) months from the end of the last preceding period, except that the final period may be varied by agreement of the parties. The first day of the second and each succeeding period shall be the effective date of price redetermination for the period.

(c) *Price redetermination.* Not more than ----[3] days nor less than ----[3] days before the end of each redetermination period, except the last, and as otherwise provided in (iii) below, the Contractor shall submit:

(i) Proposed prices for supplies which may be delivered or services which may be performed in the next succeeding period under this contract, together with—

(A) An estimate and breakdown of the costs of such supplies or services on DD Form 784 or in any other form on which the parties may agree;

(B) Sufficient data to support the accuracy and reliability of such estimate; and

(C) An explanation of the differences between such estimate and the original (or last preceding) estimate for the same supplies or services;

(ii) A statement of all costs incurred in the performance of this contract through the end of the ------[4] month prior to the date of the submission of proposed prices, on DD Form 784 or in any other form on which the parties may agree, together with sufficient supporting data to disclose unit costs and cost trends for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary);

(iii) Supplemental statements of costs incurred subsequent to the date set forth in (ii) above for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary);

as and to the extent that such information becomes available prior to the conclusion of negotiations on redetermined prices; and

(iv) Any other relevant data which may reasonably be required by the Contracting Officer.

Upon receipt of the data required by this subparagraph (c), the Contractor and the Contracting Officer shall promptly negotiate to redetermine fair and reasonable contract prices for supplies which may be delivered and services which may be performed in the period following the effective date of price redetermination. Where the Contractor fails to submit the data as required above within the time specified, payments under this contract may be suspended by the Contracting Officer until the data are furnished.

(d) *Records.* (1) The Contractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. However, no material change will be required to be made in the Contractor's accounting procedures and practices if they conform to generally accepted accounting practices and if the cost data required to be furnished under (c) above are readily ascertainable therefrom. Each subcontract placed by the Contractor hereunder on other than a firm fixed-price basis (i) shall provide that the subcontractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred in the performance of such subcontract and (ii) shall require each such subcontractor to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts which are on other than a firm fixed-price basis.

(2) The Government may at all reasonable times until the expiration of three years after final payment under this contract make such examination or audit as the Contracting Officer may require of the Contractor's books, records, documents, and other evidence, pertinent to the performance of this contract, for any period.

(e) *Certification.* An authorized responsible official of the Contractor shall certify on each statement of costs submitted to the Contracting Officer pursuant to (c) above that the incurred costs are based upon the records of the Contractor, that such records reflect generally accepted accounting principles and practices normally followed by the Contractor, that such costs are correct to the best of his knowledge and belief, and that the accompanying estimate of costs is considered reasonable.

(f) *Subcontracts.* (1) No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis; and the Contractor shall not, without the prior written consent of the Contracting Officer, place any subcontract which is on a cost-plus-a-fee basis and which would involve an estimated amount in excess of $10,000, including the fee. The Contracting Officer may, in his discretion, ratify in writing any such cost-plus-a-fee subcontract and such action shall constitute the consent of the Contracting Officer as required by this subparagraph (1).

(2) Each subcontract placed by the Contractor hereunder (i) shall provide that the Government may at all reasonable times until the expiration of three years after final payment under such subcontract make such examination or audit as the Contracting Officer may require of the subcontractor's books, records, documents, and other evidence, pertinent to the performance of the subcontract, and (ii) shall require each such subcontractor whose subcontract is on other than a firm fixed-price basis to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts. The term "subcontract," as used in this subparagraph (2) only, excludes firm fixed-price subcontracts not in excess of $2,500 and subcontracts for utility services at rates established for uniform application to the general public.

(g) *Contract modifications.* Each negotiated redetermination of prices shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer, setting forth the redetermined prices for supplies delivered and services performed hereunder during the applicable price redetermination period.

(h) *Adjustment of payments.* Pending execution of the contract modification referred to in paragraph (g) above, the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be the prices set forth in this contract: *Provided,* That if at any time it appears that the then current billing prices do not provide for payments consistent with the provisions of subparagraph (i)(3) below, the parties may agree to greater or lesser billing prices, which shall be reflected in an amendment or supplemental agreement to this contract. Billing prices are for the sole purpose of providing for interim payments and shall not affect the redetermination of prices under this clause. After execution of the contract modification referred to in paragraph (g) above, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the agreed prices, and any additional payments, refunds, or credits, resulting therefrom shall be promptly made.

(i) *Limitation on payments.* (1) This paragraph (i) shall apply only during a period for which firm prices have not been established.

(2) Within 45 days after the end of each quarter of the Contractor's fiscal year, beginning for the quarter in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and as of the end of each quarter, the Contractor shall submit to the Contracting Officer[5] a statement cumulative from the inception of the contract, setting forth:

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for and properly allocable solely to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established;

(iii) That portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (i), Limitation on Payments), which is in direct proporton to the supplies delivered (or services performed) and ac-

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[1] Where a ceiling is applicable, the following proviso shall be added: *"Provided,* That in no event shall the total amount paid under this contract exceed ------ Dollars ($------)." Alternatively, the contract may provide ceiling amounts for each or any of the price redeterminations under the contract.

[2] This point may be expressed in terms of units delivered, or as a calendar date, but in either case the period shall generally end on the last day of a month.

[3] Insert in the blanks numbers of days so that the Contractor's submission will be late enough to reflect recent cost experience (having in mind the Contractor's accounting system), but early enough to permit review, audit if necessary, and negotiation prior to the start of the prospective period.

[4] Insert the word "first," except the word "second" may be inserted if necessary to achieve compatibility with the contractor's accounting system.

[5] Insert, in contracts of the Department of the Navy, the words "with a copy thereof to the office or officer designated in this contract to make payments thereunder.

cepted by the Government for which final prices have not been established; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments); *Provided,* That such statement need not be submitted for any quarter for which either no costs are to be reported under (ii) above or revised billing prices have been established in accordance with paragraph (h) above and do not exceed the existing contract price, the Contractor's price-redetermination offer, or a price based on the most recent quarterly statement, whichever is least.

(3) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount of (2) (iv) above exceeds the sum of (2) (i), (ii), and (iii) above, the Contractor shall immediately refund or credit to the Government against existing unpaid invoices or vouchers covered by such statement the amount of such excess less (i) the cumulative total of any previous refunds or credits under this clause (exclusive of any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954) and (ii) any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954. If any portion of such excess has been applied to the liquidation of progress payments, such amount (less all tax credits under the Internal Revenue Code) may be added or restored to the unliquidated progress payment account, to the extent consistent with the progress payments clause of this contract, instead of direct refund thereof.

(4) The Contractor shall (i) insert in each price redetermination or incentive price revision subcontract hereunder the substance of this "Limitation on Payments" provision, including this subparagraph (4), modified to omit mention of the Government and reflect the position of the Contractor as purchaser and of the subcontractor as vendor, and to omit that portion of subparagraph (3) relating to tax credits, and (ii) include in each cost-reimbursement type subcontract hereunder a requirement that each price redetermination and incentive price revision subcontract thereunder will contain the substance of this "Limitation on Payments" provision, including this subparagraph (4) modified as outlined in (i) above.

(j) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon redetermined prices for any price redetermination period within sixty (60)[6] days after the date on which the data required by (c) above is to be filed, or within such further time as may be agreed upon by the parties, the failure to agree upon redetermined prices shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes," and the Contracting Officer shall promptly issue a decision thereunder. For the purpose of (g), (h), and (i) above, and pending final settlement of the disagreement on appeal, or by failure to appeal, or by agreement, such a decision shall be treated as an executed contract modification. Pending such final settlement, price redetermination for subsequent periods, if any, shall continue to be negotiated as hereinbefore provided.

(k) *Termination.* If this contract is terminated, prices shall continue to be established pursuant to this clause (i) for completed supplies accepted by the Government and services performed and accepted by the Government, and (ii) in the event of a partial termination, for supplies and services which are not terminated. All other elements of the termination shall be resolved pursuant to other applicable provisions of this contract.

[6] This period may be varied by the parties at the time of negotiating the contract.

§ 7.109–3 Prospective price redeterminations on request.

(a) *Description applicability, and limitations.* See § 3.404–3(b)(2).

(b) *Clause.*

PRICE REDETERMINATION (TYPE B) (JULY 1960)

(a) *General.* The unit prices and the total price set forth in this contract may be periodically redetermined in accordance with the provisions of this clause: *Provided,* That in no event shall the total amount paid under this contract exceed ------ dollars ($------).[1] The prices for supplies delivered and services performed prior to the first effective date of price redetermination shall remain fixed.

(b) *Price redetermination.* Upon delivery of a written request by the Government to the Contractor or by the Contractor to the Government, and upon receipt of proposed prices and the supporting data required by (c)(2) below, the Contractor and the Contracting Officer shall promptly negotiate to redetermine fair and reasonable contract prices for the supplies to be delivered and services to be performed by the Contractor after the effective date of price redetermination. The written request shall specify the effective date of price redetermination, which shall be the first date of a month and which in no event shall be prior to delivery of the request or later than ------ (------) days after the delivery of the request. No such request shall be made before ----------.[2] Neither party shall request another price redetermination having an effective date within ------ (------) days of the effective date of the last preceding price redetermination. The period of each price redetermination shall be from the effective date of that redetermination until the effective date of the next redetermination.

(c) *Submission of data.* (1) Within ------ (------)[3] days after the date of this contract or within such further time as may be specified or approved by the Contracting Officer and periodically thereafter every ------ (------) months, the Contractor shall submit a statement of all costs incurred in the performance of this contract through the end of the ------[4] month prior to the date of the submission, on DD Form 784 or in any other form on which the parties may agree, together with sufficient supporting data to disclose unit costs and cost trends for:

(i) Supplies delivered and services performed; and

(ii) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary).

(2) Upon any written request by the Contractor for price redetermination, or within ------ (------) days after receipt by the Contractor of any written request by the Government for price redetermination, the Contractor shall submit:

(i) Proposed prices for supplies which may be delivered or services which may be performed in the next succeeding period under this contract, together with—

(A) An estimate and breakdown of the costs of such supplies or services on DD Form 784 or in any other form on which the parties may agree;

(B) Sufficient data to support the accuracy and reliability of such estimate; and

(C) An explanation of the differences between such estimate and the original (or last preceding) estimate for the same supplies or services;

(ii) Supplemental statements of costs incurred subsequent to the closing date of the last preceding statement of incurred costs provided under (1) above, for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary);

as and to the extent that such information becomes available prior to the conclusion of negotiations on redetermined prices; and

(iii) Any other relevant data which may reasonably be required by the Contracting Officer.

(3) Where the Contractor fails to submit the data as required above within the time specified, payments under this contract may be suspended by the Contracting Officer until the data are furnished.

(d) *Records.* (1) The Contractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. However, no material change will be required to be made in the Contractor's accounting procedures and practices if they conform to generally accepted accounting practices and if the cost data required to be furnished under (c) above are readily ascertainable therefrom. Each subcontract placed by the Contractor hereunder on other than a firm fixed-price basis (i) shall provide that the subcontractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred in the performance of such subcontract and (ii) shall require each such subcontractor to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts which are on other than a firm fixed-price basis.

(2) The Government may at all reasonable times until the expiration of three years after final payment under this contract make such examination or audit as the Contracting Officer may require of the Contractor's books, records, documents, and other evidence, pertinent to the performance of this contract, for any period.

(e) *Certification.* An authorized responsible official of the Contractor, shall certify on each statement of costs submitted to the Contracting Officer pursuant to (c) above that the incurred costs are based upon the records of the Contractor, that such records reflect generally accepted accounting principles and practices normally followed by the Contractor, that such costs are correct to the best of his knowledge and belief, and that the accompanying estimate of costs is considered reasonable.

(f) *Subcontracts.* (1) No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis; and the Contractor shall not, without the prior written consent of the Contracting Officer, place any subcontract which is on a cost-plus-a-fee basis and which would involve an estimated amount in excess of $10,000, including the fee. The Contracting Officer may, in his discretion, ratify

[1] This proviso shall be deleted where ceilings are not applicable.

[2] The end of the first period may be expressed in terms of units delivered, or as a calendar date, but in either case the period shall end on the last day of a month.

[3] The specified number of days should be such that the end of the period for which the Contractor submits data shall coincide with the end of a month and should accommodate the objective that the periods for which the Contractor submits data should end at dates which are compatible with the contractor's accounting system.

[4] Insert the word "first," except the word "second" may be inserted if necessary to achieve compatibility with the contractor's accounting system.

in writing any such cost-plus-a-fee subcontract and such action shall constitute the consent of the Contracting Officer as required by this subparagraph (1).

(2) Each subcontract placed by the Contractor hereunder (i) shall provide that the Government may, at all reasonable times until the expiration of three years after final payments under such subcontract make such examination or audit as the Contracting Officer may require of the subcontractor's books, records, documents, and other evidence, pertinent to the performance of the subcontract, and (ii) shall require each such subcontractor whose subcontract is on other than a firm fixed-price basis to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts. The term "subcontract," as used in this subparagraph (2) only, excludes firm fixed-price subcontracts not in excess of $2,500 and subcontracts for utility services at rates established for uniform application to the general public.

(g) *Contract modifications.* Each negotiated redetermination of prices shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer, setting forth the redetermined prices for supplies delivered and services performed hereunder during the applicable price redetermination period.

(h) *Adjustment of payments.* Pending execution of the contract modification referred to in paragraph (g) above, the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be the prices set forth in this contract: *Provided* That if at any time it appears that the then current billing prices do not provide for payments consistent with the provisions of subparagraph (1)(3) below, the parties may agree to greater or lesser billing prices, which shall be reflected in an amendment or supplemental agreement to this contract. Billing prices are for the sole purpose of providing for interim payments and shall not affect the redetermination of prices under this clause. After execution of the contract modification referred to in paragraph (g) above, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the agreed prices, and any additional payments, refunds, or credits, resulting therefrom shall be promptly made.

(i) *Limitation on payments.*

(1) This paragraph (i) shall apply only during a period for which firm prices have not been established.

(2) Within 45 days after the end of each quarter of the Contractor's fiscal year, beginning for the quarter in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and as of the end of each quarter, the Contractor shall submit to the Contracting Officer [5] a statement cumulative from the inception of the contract, setting forth:

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for and properly allocable solely to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established;

(iii) That portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (i), Limitation on Payments), which is in direct proportion to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments);

Provided, That such statement need not be submitted for any quarter for which either no costs are to be reported under (ii) above or revised billing prices have been established in accordance with paragraph (h) above and do not exceed the existing contract price, the Contractor's price-redetermination offer, or a price based on the most recent quarterly statement, whichever is least.

(3) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount of (2) (iv) above exceeds the sum of (2) (i), (ii), and (iii) above the Contractor shall immediately refund or credit to the Government against existing unpaid invoices or vouchers covered by such statement the amount of such excess less (i) the cumulative total of any previous refunds or credits under this clause (exclusive of any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954) and (ii) any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954. If any portion of such excess has been applied to the liquidation of progress payments, such amount (less all tax credits under the Internal Revenue Code) may be added or restored to the unliquidated progress payment account, to the extent consistent with the progress payments clause of this contract, instead of direct refund thereof.

(4) The Contractor shall (i) insert in each price redetermination or incentive price revision subcontract hereunder the substance of this "Limitation on Payments" provision, including this subparagraph (4), modified to omit mention of the Government and reflect the position of the Contractor as purchaser and of the subcontractor as vendor, and to omit that portion of subparagraph (3) relating to tax credits, and (ii) include in each cost-reimbursement type subcontract hereunder a requirement that each price redetermination and incentive price revision subcontract thereunder will contain the substance of this "Limitation on Payments" provision, including this subparagraph (4), modified as outlined in (i) above.

(j) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon redetermined prices for any price redetermination period within sixty (60) [6] days after the date on which the data required by (c) above is to be filed, or within such further time as may be agreed upon by the parties, the failure to agree upon redetermined prices shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes," and the Contracting Officer shall promptly issue a decision thereunder. For the purpose of (g), (h), and (i) above, and pending final settlement of the disagreement on appeal, or by failure to appeal, or by agreement, such a decision shall be treated as an executed contract modification. Pending such final settlement, price redetermination for subsequent periods, if any, shall continue to be negotiated as hereinbefore provided.

(k) *Termination.* If this contract is terminated, prices shall continue to be established pursuant to this clause (i) for completed supplies accepted by the Government and services performed and accepted by the Government, and (ii) in the event of a partial termination, for supplies and services which are not terminated. All other elements of this termination shall be resolved pursuant to other applicable provisions of this contract.

§ 7.109–4 Retroactive and prospective price redetermination at a stated time prior to completion.

(a) *Description, applicability and limitations.* See § 3.403–3(b)(3).

(b) *Clause.*

PRICE REDETERMINATION (TYPE C) (JULY 1960)

(a) *General.* The unit prices and the total price set forth in this contract shall be redetermined in accordance with the provisions of this clause; *provided* that in no event shall the total amount paid under this contract exceed ------ dollars ($------).

(b) *Price redetermination.* Within ------ (------) days after the end of the month in which there is completion of ----------,[1] the Contractor shall submit:

(i) Proposed prices for supplies delivered and to be delivered and services performed and to be performed under this contract;

(ii) A statement of all costs incurred in the performance of this contract through the end of the month specified above, on DD Form 784 or in any other form on which the parties may agree, together with sufficient supporting data to disclose unit costs and cost trends for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary);

(iii) An estimate of costs of all supplies delivered and to be delivered and all services performed and to be performed under this contract, using the statement of costs incurred plus an estimate of costs to complete performance, on DD Form 784 or in any other form on which the parties may agree, together with—

(A) Sufficient data to support the accuracy and reliability of such estimate; and

(B) An explanation of the differences between such estimate and the original estimate used in establishing the unit prices set forth in this contract for the same supplies or services;

(iv) Supplemental statements of costs incurred subsequent to the end of the month specified in (ii) above for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary);

as and to the extent that such information becomes available prior to the conclusion of negotiations on redetermined prices; and

(v) Any other relevant data which may reasonably be required by the Contracting Officer.

Upon receipt of data required by this subparagraph (b), the Contractor and the Contracting Officer shall promptly negotiate to redetermine fair and reasonable contract prices for supplies delivered and to be delivered and services performed and to be performed under this contract. Where the Contractor fails to submit the data as required above within the time specified, payments under this contract may be suspended by the Contracting Officer until the data are furnished.

(c) *Records.* (1) The Contractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever

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[5] Insert, in contracts of the Department of the Navy, the words: "with a copy thereof to the office or offices designated in this contract to make payments thereunder."

[6] This period may be varied by the parties at the time of negotiating the contract.

[1] The degree of completion may be based on units delivered to the Government, percentage of contract performance, or any other reasonable basis.

nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. However, no material change will be required to be made in the Contractor's accounting procedures and practices if they conform to generally accepted accounting practices and if the cost data required to be furnished under (b) above are readily ascertainable therefrom. Each subcontract placed by the Contractor hereunder on other than a firm fixed-price basis (i) shall provide that the subcontractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred in the performance of such subcontract and (ii) shall require each such subcontractor to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts which are on other than a firm fixed-price basis.

(2) The Government may at all reasonable times until the expiration of three years after final payment under this contract make such examination or audit as the Contracting Officer may require of the Contractor's books, records, documents, and other evidence, pertinent to the performance of this contract, for any period.

(d) *Certification.* An authorized responsible official of the Contractor shall certify on each statement of costs submitted to the Contracting Officer pursuant to (b) above that the incurred costs are based upon the records of the Contractor, that such records reflect generally accepted accounting principles and practices normally followed by the Contractor, that such costs are correct to the best of his knowledge and belief, and that the accompanying estimate of costs is considered reasonable.

(e) *Subcontracts.* (1) No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis; and the Contractor shall not, without the prior written consent of the Contracting Officer, place any subcontract which is on a cost-plus-a-fee basis and which would involve an estimated amount in excess of $10,000, including the fee. The Contracting Officer may, in his discretion, ratify in writing any such cost-plus-a-fee subcontract and such action shall constitute the consent of the Contracting Officer as required by this subparagraph (1).

(2) Each subcontract placed by the Contractor hereunder (i) shall provide that the Government may at all reasonable times until the expiration of three years after final payment under such subcontract make such examination or audit as the Contracting Officer may require of the subcontractor's books, records, documents, and other evidence, pertinent to the performance of the subcontract, and (ii) shall require each such subcontractor whose subcontract is on other than a firm fixed-price basis to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts. The term "subcontract," as used in this subparagraph (2) only, excludes firm fixed-price subcontracts not in excess of $2,500 and subcontracts for utility services at rates established for uniform application to the general public.

(f) *Contract modification.* The negotiated redetermination of price shall be evidenced by a modification to this contract signed by the Contractor and the Contracting Officer, setting forth the redetermined prices for supplies delivered and to be delivered and services performed and to be performed hereunder.

(g) *Adjustment of payments.* Pending execution of the contract modification referred to in paragraph (f) above, the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be the prices set forth in this contract: *Provided,* That if at any time it appears that the then current billing prices do not provide for payments consistent with the provisions of subparagraph (h) (3) below, the parties may agree to greater or lesser billing prices, which shall be reflected in an amendment or supplemental agreement to this contract. Billing prices are for the sole purpose of providing for interim payments and shall not affect the redetermination of prices under this clause. After execution of the contract modification referred to in paragraph (f) above, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the agreed prices, and any additional payments, refunds, or credits, resulting therefrom shall be promptly made.

(h) *Limitation on payments.* (1) This paragraph (h) shall apply only during a period for which firm prices have not been established.

(2) Within 45 days after the end of each quarter of the Contractor's fiscal year, beginning for the quarter in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and as of the end of each quarter, the Contractor shall submit to the Contracting Officer [2] a statement cumulative from the inception of the contract, setting forth:

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for and properly allocable solely to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established;

(iii) That portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (h), Limitation on Payments), which is in direct proportion to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments);

Provided, That such statement need not be submitted for any quarter for which either no costs are to be reported under (ii) above or revised billing prices have been established in accordance with paragraph (h) above and do not exceed the existing contract price, the Contractor's price-redetermination offer, or a price based on the most recent quarterly statement, whichever is least.

(3) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount of (2) (iv) above exceeds the sum of (2) (i), (ii), and (iii) above, the Contractor shall immediately refund or credit to the Government against existing unpaid invoices or vouchers covered by such statement the amount of such excess less (i) the cumulative total of any previous refunds or credits under this clause (exclusive of any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954) and (ii) any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954. If any portion of such excess has been applied to the liquidation of progress payments, such amount (less all tax credits under the Internal Revenue Code) may be added or restored to the unliquidated progress payment account, to the extent consistent with the progress payments clause of this contract, instead of direct refund thereof.

(4) The Contractor shall (i) insert in each price redetermination or incentive price revision subcontract hereunder the substance of this "Limitation on Payments" provision, including this subparagraph (4), modified to omit mention of the Government and reflect the position of the Contractor as purchaser and of the subcontractor as vendor, and to omit that portion of subparagraph (3) relating to tax credits, and (ii) include in each cost-reimbursement type subcontract hereunder a requirement that each price redetermination and incentive price revision subcontract thereunder will contain the substance of this "Limitation on Payments" provision, including this subparagraph (4), modified as outlined in (i) above.

(i) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon redetermined prices within sixty (60) [3] days after the date on which the data required by (b) above is to be filed, or within such further time as may be agreed upon by the parties, the failure to agree upon redetermined prices shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes," and the Contracting Officer shall promptly issue a decision thereunder. For the purpose of paragraphs (f), (g), and (h) above, and pending final settlement of the disagreement on appeal, or by failure to appeal, or by agreement, such a decision shall be treated as an executed contract modification.

(j) *Termination.* If this contract is terminated prior to price redetermination, prices shall be established pursuant to this clause (i) for completed supplies accepted by the Government and services performed and accepted by the Government, and (ii) in the event of a partial termination, for supplies and services which are not terminated. All other elements of the termination shall be resolved pursuant to other applicable provisions of this contract.

§ 7.109–5 Retroactive and prospective price redetermination including further prospective redetermination on request.

(a) *Description, applicability and limitation.* See § 3.403–3(b)(4).

(b) *Clause.*

PRICE REDETERMINATION (TYPE D)
(JULY 1960)

(a) *General.* The unit prices and the total price set forth in this contract shall be redetermined in accordance with the provisions of this clause: *Provided,* That in no event shall the total amount paid under this contract exceed _____ dollars ($ _____).

(b) *Price redetermination.* (1) *Mandatory.* Within _____ (_____) days after the end of the month in which there is completion of _____,[1] the Contractor shall submit:

(i) Proposed prices for supplies delivered and to be delivered and services performed and to be performed under this contract;

(ii) A statement of all costs incurred in the performance of this contract through the end of the month specified above on DD Form 784 or in any other form on which the parties may agree, together with sufficient supporting data to disclose unit costs and cost trends for—

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[2] Insert, in contracts of the Department of the Navy, the words: "with a copy thereof to the office or officer designated in the contract to make payments thereunder."

[3] This period may be varied by the parties at the time of negotiating the contract.

[1] The degree of completion may be based on units delivered to the Government, percentage of contract performance, or any other reasonable basis.

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary);

(iii) An estimate of costs of all supplies delivered and to be delivered and all services performed and to be performed under this contract, using the statement of costs incurred plus an estimate of costs to complete performance, on DD Form 784 or in any other form on which the parties may agree, together with—

(A) Sufficient data to support the accuracy and reliability of such estimate; and

(B) An explanation of the differences between such estimate and the original estimate used in establishing the unit prices set forth in this contract for the same supplies or services;

(iv) Supplemental statements of costs incurred subsequent to the end of the month specified in (ii) above for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary); as and to the extent that such information becomes available prior to the conclusion of negotiations on redetermined prices; and

(v) Any other relevant data which may reasonably be required by the Contracting Officer.

Upon receipt of data required by this subparagraph (b)(1), the Contractor and the Contracting Officer shall promptly negotiate to redetermine fair and reasonable contract prices for supplies delivered and to be delivered and services performed and to be performed under this contract. Where the Contractor fails to submit the data as required above within the time specified, payments under this contract may be suspended by the Contracting Officer until the data are furnished.

(2) *Optional.* *a.* Upon delivery of a written request by the Government to the Contractor or by the Contractor to the Government, and upon receipt of proposed prices and the supporting data required by *b.2.* below, the Contractor and the Contracting Officer shall promptly negotiate to redetermine fair and reasonable contract prices for the supplies to be delivered and services to be performed by the Contractor after the effective date of price redetermination. The written request shall specify the effective date of the requested price redetermination, which shall be the first day of a month and which in no event shall be prior to delivery of the request or later than ---------- (----) days after the delivery of the request. No such request shall be made before ---------- (----) days after the price redetermination required by subparagraph (1) above has been effected either by agreement or by decision of the Contracting Officer under paragraph (i) below. Neither party shall request another price redetermination having an effective date within ------ (----) days of the effective date of the last preceding price redetermination. The period of each price redetermination shall be from the effective date of that redetermination until the effective date of the next redetermination.

b.1. Within ------ (------)[2] days after the price redetermination required by subparagraph (1) above has been effected either by agreement or by decision of the Contracting Officer under paragraph (i) below, or within such further time as may be specified or approved by the Contracting Officer and periodically thereafter every ------ (------) months, the Contractor shall submit a statement of all costs incurred in the performance of this contract through the end of the month prior to the date of the submission, on DD Form 784 or in any other form on which the parties may agree, together with sufficient data to disclose unit costs and cost trends for:

(i) Supplies delivered and services performed; and

(ii) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary).

2. Upon any written request by the Contractor for price redetermination or within ------ (------) days after receipt by the Contractor of any written request by the Government for price redetermination, the Contractor shall submit:

(i) Proposed prices for supplies which may be delivered or services which may be performed in the next succeeding period under this contract, together with—

(A) An estimate and breakdown of the costs of such supplies or services, on DD Form 784 or in any other form on which the parties may agree;

(B) Sufficient data to support the accuracy and reliability of such estimate; and

(C) An explanation of the differences between such estimate and the original (or last preceding estimate) for the same supplies or services;

(ii) Supplemental statements of costs incurred subsequent to the closing date of the last preceding statement of incurred costs provided under *b.1.* above, for—

(A) Supplies delivered and services performed; and

(B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary);

as and to the extent that such information becomes available prior to the conclusion of negotiations on redetermined prices; and

(iii) Any other relevant data which may reasonably be required by the Contracting Officer.

[2] The specified number of days should be such that the end of the period for which the contractor submits data shall coincide with the end of the month.

3. Where the Contractor fails to submit the required data within the time specified, payments under this contract may be suspended by the Contracting Officer until the data are furnished.

(c) *Records.* (1) The Contractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. However, no material change will be required to be made in the Contractor's accounting procedures and practices if they conform to generally accepted accounting practices and if the cost data required to be furnished under (b) above are readily ascertainable therefrom. Each subcontract placed by the Contractor hereunder on other than a firm fixed-price basis (i) shall provide that the subcontractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred in the performance of such subcontract and (ii) shall require each such subcontractor to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts which are on other than a firm fixed-price basis.

(2) The Government may at all reasonable times until the expiration of three years after final payment under this contract make such examination of audit as the Contracting Officer may require of the Contractor's books, records, documents, and other evidence pertinent to the performance of this contract, for any period.

(d) *Certification.* An authorized responsible official of the Contractor shall certify on each statement of costs submitted to the Contracting Officer pursuant to (c) above that the incurred costs are based upon the records of the Contractor, that such records reflect generally accepted accounting principles and practices normally followed by the Contractor, that such costs are correct to the best of his knowledge and belief, and that the accompanying estimate of costs is considered reasonable.

(e) *Subcontracts.* (1) No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis; and the Contractor shall not, without the prior written consent of the Contracting Officer, place any subcontract which is on a cost-plus-a-fee basis and which would involve an estimated amount in excess of $10,000, including the fee. The Contracting Officer may, in his discretion, ratify in writing any such cost-plus-a-fee subcontract and such action shall constitute the consent of the Contracting Officer as required by this subparagraph (1).

(2) Each subcontract placed by the Contractor hereunder (i) shall provide that the Government may at all reasonable times until the expiration of three years after final payment under such subcontract make such examination or audit as the Contracting Officer may require of the subcontractor's books, records, documents, and other evidence, pertinent to the performance of the subcontract, and (ii) shall require each such subcontractor whose subcontract is on other than a firm fixed-price basis to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts. The term "subcontract," as used in this subparagraph (2) only, excludes firm fixed-price subcontracts not in excess of $2,500 and subcontracts for utility services at rates established for uniform application to the general public.

(f) *Contract modifications.* Each negotiated redetermination of prices shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer, setting forth the redetermined prices for supplies delivered and services performed hereunder during the applicable price redetermination period.

(g) *Adjustment of payments.* Pending execution of the contract modification referred to in paragraph (f) above, the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be the prices set forth in this contract: *Provided,* That if at any time it appears that the then current billing prices do not provide for payments consistent with the provisions of subparagraph (h)(3) below, the parties may agree to revised billing prices, which shall be reflected in an amendment or supplemental agreement to this contract. Billing prices are for the sole purpose of providing for interim payments and shall not affect the redetermination of prices under this clause. After execution of the contract modification referred to in paragraph (f) above, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the agreed prices, and any additional payments, refunds, or credits, resulting therefrom shall be promptly made.

(h) *Limitation on payments.* (1) This paragraph (h) shall apply only during a period for which firm prices have not been established.

(2) Within 45 days after the end of each quarter of the Contractor's fiscal year, beginning for the quarter in which a delivery is first made (or services are first performed) and accepted by the Government under this contract and as of the end of each quarter, the Contractor shall submit to the Contracting Officer[3] a statement cumulative from the inception of the contract, setting forth:

(i) The total contract price of all supplies

[3] Insert, in contracts of the Department of the Navy, the words: "with a copy thereof to the office or officer designated in this contract to make payments thereunder."

delivered (or services performed) and accepted by the Government for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for and properly allocable solely to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established;

(iii) That portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (h), Limitation on Payments), which is in direct proportion to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments);

Provided, That such statement need not be submitted for any quarter for which either no costs are to be reported under (ii) above or revised billing prices have been established in accordance with paragraph (h) above and do not exceed the existing contract price, the Contractor's price-redetermination offer, or a price based on the most recent quarterly statement, whichever is least.

(3) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount of (2)(iv) above exceeds the sum of (2) (i), (ii), and (iii) above, the Contractor shall immediately refund or credit to the Government against existing unpaid invoices or vouchers covered by such statement the amount of such excess less (i) the cumulative total of any previous refunds or credits under this clause (exclusive of any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954) and (ii) any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954. If any portion of such excess has been applied to the liquidation of progress payments, such amount (less all tax credits under the Internal Revenue Code) may be added or restored to the unliquidated progress payment account, to the extent consistent with the progress payments clause of this contract, instead of direct refund thereof.

(4) The Contractor shall (i) insert in each price redetermination or incentive price revision subcontract hereunder the substance of this "Limitation on Payments" provision, including this subparagraph (4), modified to omit mention of the Government and reflect the position of the Contractor as purchaser and of the subcontractor as vendor, and to omit that portion of subparagraph (3) relating to tax credits, and (ii) include in each cost-reimbursement type subcontract hereunder a requirement that each price redetermination and incentive price revision subcontract thereunder will contain the substance of this "Limitation on Payments" provision, including this subparagraph (4), modified as outlined in (i) above.

(i) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon redetermined prices for any price redetermination period within sixty (60)[4] days after the date on which the data required by (b) above is to be filed, or within such further time as may be agreed upon by the parties, the failure to agree upon redetermined prices shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes," and the Contracting Officer shall promptly issue a decision thereunder. For the purpose of paragraphs (f), (g), and (h) above, and pending final settlement of the disagreement on appeal, or by failure to appeal, or by agreement, such a decision shall be treated as an executed contract modification. Pending such final settlement, price redetermination for subsequent periods, if any, shall continue to be negotiated as hereinbefore provided.

(j) *Termination.* If this contract is terminated, prices shall continue to be established pursuant to this clause (i) for completed supplies accepted by the Government and services performed and accepted by the Government, and (ii) in the event of a partial termination, for supplies and services which are not terminated. All other elements of the termination shall be resolved pursuant to other applicable provisions of this contract.

§ 7.109–6 Retroactive price redetermination after completion.

(a) *Description, applicability, and limitations.* See § 3.403–3(b)(5).

(b) *Clause.*

PRICE REDETERMINATION (TYPE E) (JULY 1960)

(a) *General.* The unit prices and the total price set forth in this contract shall be redetermined in accordance with the provisions of this clause: *Provided,* That in no event shall the total amount paid under this contract exceed _____ dollars ($_____).

(b) *Price redetermination.* Within _____ (_____) days after delivery of all supplies to be delivered and completion of all services to be performed under this contract, the Contractor shall submit (i) proposed prices, (ii) a statement of all costs incurred in the performance of this contract, on DD Form 784 or any other form on which the parties may agree, and (iii) any other relevant data which may reasonably be required by the Contracting Officer. Upon receipt of the required data, the Contractor and the Contracting Officer shall promptly negotiate to redetermine fair and reasonable contract prices for supplies delivered and services performed by the Contractor under this contract. Where the Contractor fails to submit the required data within the time specified, payment of all invoices may be suspended by the Contracting Officer until the data are furnished.

(c) *Records.* (1) The Contractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred for the performance of this contract. However, no material change will be required to be made in the Contractor's accounting procedures and practices if they conform to generally accepted accounting practices and if the cost data required to be furnished under (b) above are readily ascertainable therefrom. Each subcontract placed by the Contractor hereunder on other than a firm fixed-price basis (i) shall provide that the subcontractor shall maintain books, records, documents, and other evidence, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred in the performance of such subcontract and (ii) shall require each such subcontractor to insert the entire substance of this subparagraph, including this (ii), in all its subcontracts which are on other than a firm fixed-price basis.

(2) The Government may at all reasonable times until the expiration of three years after final payment under this contract make such examination or audit as the Contracting Officer may require of the Contractor's books, records, documents, and other evidence, pertinent to the performance of this contract.

(d) *Certification.* An authorized responsible official of the Contractor shall certify on each statement of costs submitted to the Contracting Officer pursuant to (c) above that the incurred costs are based upon the records of the Contractor, that such records reflect generally accepted accounting principles and practices normally followed by the Contractor, that such costs are correct to the best of his knowledge and belief, and that the accompanying estimate of costs is considered reasonable.

(e) *Subcontracts.* (1) No subcontract under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis; and the Contractor shall not, without the prior written consent of the Contracting Officer, place any subcontract which is on a cost-plus-a-fee basis and which would involve an estimated amount in excess of $10,000, including the fee. The Contracting Officer may, in his discretion, ratify in writing any such cost-plus-a-fee subcontract and such action shall constitute the consent of the Contracting Officer as required by this subparagraph (1).

(2) Each subcontract placed by the Contractor hereunder (i) shall provide that the Government may at all reasonable times until the expiration of three years after final payment under such subcontract make such examination or audit as the Contracting Officer may require of the subcontractor's books, records, documents, and other evidence, pertinent to the performance of the subcontract, and (ii) shall require each such subcontractor whose subcontract is on other than a firm fixed-price basis to insert the entire substance of this subparagraph, including this (ii) in all its subcontracts. The term "subcontract," as used in this subparagraph (2) only, excludes firm fixed-price subcontracts not in excess of $2,500 and subcontracts for utility services at rates established for uniform application to the general public.

(f) *Contract modification.* The negotiated redetermination of price shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer, setting forth the redetermined prices which shall apply to supplies delivered and to services performed by the Contractor hereunder.

(g) *Adjustment of payments.* Pending execution of the contract modification referred to in paragraph (f) above, the Contractor shall submit invoices or vouchers in accordance with billing prices as provided in this paragraph. The billing prices shall be the prices set forth in this contract: *Provided,* That if at any time it appears that the then current billing prices do not provide for payments consistent with the provisions of subparagraph (h)(3) below, the parties may agree to greater or lesser billing prices, which shall be reflected in an amendment or supplemental agreement to this contract. Billing prices are for the sole purpose of providing for interim payments and shall not affect the redetermination of prices under this clause. After execution of the contract modification referred to in paragraph (f) above, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the agreed prices, and any additional payments, refunds, or credits, resulting therefrom shall be promptly made.

(h) *Limitation on payments.* (1) This paragraph (h) shall apply until final price redetermination to the full extent permitted by this contract.

(2) Within 45 days after the end of each quarter of the Contractor's fiscal year, beginning for the quarter in which a delivery is first made (or services are first performed) and accepted by the Government under this contract, and as of the end of each quarter, the Contractor shall submit to the Contracting Officer[1] a statement cumulative from the inception of the contract, setting forth:

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[4] This period may be varied by the parties at the time of negotiating the contract.

[1] Insert, in contracts of the Department of the Navy, the words: "With a copy thereof to the office or offices designated in the contract to make payments thereunder."

(i) The total contract price of all supplies delivered (or services performed) and accepted by the Government for which final prices have been established;

(ii) The total costs (estimated to the extent necessary) reasonably incurred for and properly allocable solely to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established;

(iii) That portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (h), Limitation on Payments), which is in direct proportion to the supplies delivered (or services performed) and accepted by the Government for which final prices have not been established; and

(iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by the Government (including amounts applied or to be applied to liquidate progress payments).

(3) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount of (2) (iv) above exceeds the sum of (2) (i), (ii), and (iii) above, the Contractor shall immediately refund or credit to the Government against existing unpaid invoices or vouchers covered by such statement the amount of such excess less (i) the cumulative total of any previous refunds or credits under this clause (exclusive of any applicable tax credits under Section 1481 of the Internal Revenue Code of 1954) and (ii) any applicable tax credits under Section 1481 of the Internal Revnue Code of 1954. If any portion of such excess has been applied to the liquidation of progress payments, such amount (less all tax credits under the Internal Revenue Code) may be added or restored to the unliquidated progress payment account, to the extent consistent with the progress payments clause of this contract, instead of direct refund thereof.

(4) The Contractor shall (i) insert in each price redetermination or incentive price revision subcontract hereunder the substance of this "Limitation on Payments" provision, including this subparagraph (4), modified to omit mention of the Government and reflect the position of the Contractor as purchaser and of the subcontractor as vendor, and to omit that portion of subparagraph (3) relating to tax credits, and (ii) include in each cost-reimbursement type subcontract hereunder a requirement that each price redetermination and incentive price revision subcontract thereunder will contain the substance of this "Limitation on Payments" provision, including this subparagraph (4), modified as outlined in (i) above.

(i) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon redetermined prices within sixty (60) [2] days after the date on which the data required by (b) above is to be filed, or within such further time as may be agreed upon by the parties, the failure to agree upon redetermined prices shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes," and the Contracting Officer shall promptly issue a decision thereunder. For the purpose of paragraphs (f), (g), and (h) above, and pending final settlement of the disagreement on appeal, or by failure to appeal, or by agreement, such a decision shall be treated as an executed contract modification.

(j) *Termination.* If this contract is terminated prior to price redetermination, prices shall be established pursuant to this clause (i) for completed supplies and services which are not terminated. All other elements of the termination shall be resolved pursuant to other applicable provisions of this contract.

§ 7.109–7 Modified retroactive and prospective price redetermination for follow-on contracts.

(a) *Descriptions, applicability, and limitations.* See § 3.403–3(b)(6) of this chapter.

(b) *Clause.* Where a follow-on contract is to be geared to a preceding contract for pricing purposes and is to provide for retroactive and prospective price redetermination at a stated time prior to completion, the clause in § 7.109–4 shall be used except that the caption will read "Price Redetermination (Modified Type C)" and the paragraph set forth below will be substituted for the text of paragraph (b) of the clause in § 7.109–4. Where such a follow-on contract is to provide for retroactive and prospective price redetermination including further prospective redetermination upon request, the clause in § 7.109–5 shall be used except that the caption will read "Price Redetermination (Modified Type D)" and the paragraph set forth below will be substituted for the text of subparagraph (b)(1) of the clause in § 7.109–5.

Upon completion of deliveries under Contract No. ------, herein called the preceding contract, or at such other time as the Contracting Officer may fix after negotiation of a mandatory price redetermination is to begin under the preceding contract, and as otherwise provided in (ii) below, the Contractor shall submit:

(i) Proposed prices for supplies delivered and to be delivered and services performed and to be performed under this contract;

(ii) Statements of incurred costs and cost estimates, on DD Form 748 or in any other form on which the parties may agree, to be submitted separately both for this contract and for the preceding contract until its completion, covering each of the following:

(A) All costs incurred in the performance of such contracts through the end of the --------[1] month before the submission, together with sufficient supporting data to disclose unit costs and cost trends for:

(I) Supplies delivered and services performed; and

(II) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary);

(B) An estimate of costs of all supplies delivered and to be delivered and all services performed and to be performed under such contracts, using the statement of costs incurred plus an estimate of costs to complete performance, together with:

(I) Sufficient data to support the accuracy and reliability of such estimate; and

(II) An explanation of the differences between such estimate and the original estimate used in establishing the unit prices set forth in this contract for the same supplies or services; and

(C) Supplemental statements of costs incurred subsequent to the end of the month specified in (A) above for:

(I) Supplies delivered and services performed; and

(II) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary); as and to the extent that such information becomes available prior to the conclusion of negotiations on redetermined prices; and

(III) Any other relevant data which may reasonably be required by the Contracting Officer.

Upon the receipt of the data required above, the Contractor and the Contracting Officer shall promptly negotiate to redetermine fair and reasonable prices for supplies delivered and to be delivered and services performed and to be performed under this contract. Where the Contractor fails to submit data as required above within the time specified, payments under this contract may be suspended by the Contracting Officer until the data are furnished.

[1] Insert the word "first," except the word "second" may be inserted if necessary to achieve compatibility with the contractor's accounting system.

[2] This period may be varied by the parties at the time of negotiating the contract.

Subpart B—Clauses for Cost-Reimbursement Type Supply Contracts

§ 7.200 Scope of subpart.

This subpart sets forth uniform contract clauses for use in cost-reimbursement type supply contracts as defined in § 7.202.

§ 7.202 Applicability.

As used throughout this subpart, the term "cost-reimbursement type supply contract" shall mean any contract (other than a letter contract, letter of intent, preliminary notice of award; or amendment or a supplemental agreement to a contract which does not effect new procurement) entered into on a cost or cost-plus-a-fixed-fee basis as covered in § 3.404 of this subchapter for supplies other than (a) the construction, alteration or repair of buildings, bridges, roads, or other kinds of real property, (b) experimental, developmental, or research work, or (c) facilities to be provided by the Government under a "facilities contract" as defined in Part 13 of this subchapter.

§ 7.203 Required clauses.

The following clauses shall be inserted in all cost-reimbursement type supply contracts.

§ 7.203–1 Definitions.

Insert the contract clause set forth in § 7.103–1. Additional definitions may be included in such clause provided they are not inconsistent with such clause or the provisions of this subchapter.

§ 7.203–2 Changes.

CHANGES (JAN. 1958)

The Contracting Officer may at any time, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; (iii) place of delivery; and (iv) the amount of Government-furnished property. If any such change causes an increase or decrease in the estimated cost of, or the time required for the performance of any part of the work under this contract, whether changed or not changed by any such order, or otherwise affects any other provision of this contract, an equitable adjustment shall be made (i) in the estimated cost or delivery

schedule, or both, (ii) in the amount of any fixed fee to be paid to the Contractor, and (iii) in such other provisions of the contract as may be so affected, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the day of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

In the foregoing clause, the period of "thirty (30) days" within which any claim for adjustment must be asserted may be varied in accordance with Departmental procedures.

In the interest of economy, the Government has a basic responsibility fully to utilize its property. Consistent therewith the Government has reserved the right in the above clause to make changes in the amount of Government-furnished property, including the right to increase the amount of Government-furnished property. Prior to exercising the right to increase the amount of Government-furnished property, contracting officers will consider fully any inequities which may result to the contractor as against the net benefits which may accrue to the Government.

§ 7.203–3 Limitation of cost.

LIMITATION OF COST (OCT. 1953)

(a) It is estimated that the total cost to the Government, exclusive of any fixed fee, for the performance of this contract will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such estimated cost. If at any time the Contractor has reason to believe that the costs which it expects to incur in the performance of this contract in the next succeeding thirty (30) days, when added to all costs previously incurred, will exceed eighty-five percent (85%) of the estimated cost then set forth in the Schedule, or if at any time, the Contractor has reason to believe that the total cost to the Government, exclusive of any fixed fee, for the performance of this contract will be substantially greater or less than the then estimated cost thereof, the Contractor shall notify the Contracting Officer in writing to that effect, giving its revised estimate of such total cost for the performance of this contract.

(b) The Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, and the Contractor shall not be obligated to continue performance under the contract or to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. When and to the extent that the estimated cost set forth in the Schedule has been increased, any costs incurred by the Contractor in excess of such estimated cost prior to the increase in estimated cost shall be allowable to the same extent as if such costs had been incurred after such increase in estimated cost.

§ 7.203–4 Allowable Cost, Fee, and Payment.

(a) Except as provided in paragraphs (b) and (c)(5) of this section, the following clause shall be inserted in all cost-reimbursement type supply contracts. Additional instructions for use are in paragraph (c) of this section.

ALLOWABLE COST, FIXED FEE, AND PAYMENT (APR. 1959)

(a) For the performance of this contract, the Government shall pay to the Contractor:

(i) The cost thereof (hereinafter referred to as "allowable cost") determined by ----------* to be allowable in accordance with—

(A) Subpart B as in effect on the date of this contract; and of Part 15 of this Subchapter.

(B) The terms of this contract; and

(ii) Such fixed fee, if any, as may be provided for in the Schedule.

(b) Once each month (or at more frequent intervals, if approved by ----------*) the Contractor may submit to an authorized representative of ----------*, in such form and reasonable detail as such representative may require, an invoice or public voucher supported by a statement of cost incurred by the Contractor in the performance of this contract and claimed to constitute allowable cost.

(c)(1) As promptly as may be practicable after the receipt of each invoice or voucher and statement of cost, the Government shall, except as otherwise provided in this contract, and subject to the provisions of paragraph (d) below, make payment thereon, as approved by ----------,* to the extent of:

(i) 100 percent of such approved costs representing progress payments to subcontractors under fixed price type subcontracts: *Provided,* That such payments by the Government to the Contractor shall not exceed 70 percent of the costs incurred by such subcontractors,

(ii) 100 percent of such approved costs representing cost reimbursement to subcontractors under cost reimbursement type subcontracts: *Provided,* That for cost reimbursement type subcontracts not covered by the exceptions listed in § 3.404–3(d)(2) of this subchapter, as in effect on the date of this contract, such payments by the Government shall not exceed 80 percent of the costs incurred by such subcontractors, and

(iii) 80 percent of all other such approved costs.

The cumulative amount of such invoices or vouchers from time to time approved but not paid pursuant to the foregoing provisions (regardless of whether they are paid under the next sentence hereof) shall constitute a gross withheld payments amount. Upon acceptance and delivery of articles called for by item ------** of this contract, the Government shall pay to the Contractor an amount which, when added to any amounts previously paid under this sentence, shall be the same percentage of the gross withheld payments amount as the cumulative number of articles accepted and delivered under item ------** of this contract is of the total number of articles called for by such item.

(2) Payment of the fixed fee, if any, shall be made to the Contractor as specified in the Schedule: *Provided, however,* That after payment of eighty-five percent (85%) of the fixed fee set forth in the Schedule, further payment on account of the fixed fee shall be withheld until a reserve of either fifteen percent (15%) of the total fixed fee, or one hundred thousand dollars ($100,000), whichever is less, shall have been set aside.

(3) The total of the amounts which may be withheld at any one time under both (c)(1) and (c)(2) above shall not exceed the greatest amount which may then be withheld under either (c)(1) or (c)(2), whichever permits the greater withholding at that time.

(4) In the event of complete termination of the work remaining to be performed under this contract or in the event of cessation of performance pursuant to the clause of this contract entitled "Limitation of Cost," the Government shall, subject to the provisions of paragraph (d) below, pay the balance of the gross withheld payments amount to the Contractor within sixty (60) days from the effective date of termination or date of written notice to the Government that performance has been discontinued pursuant to the clause entitled "Limitation of Cost," as the case may be.

(d) At any time or times prior to final payment under this contract ----------* may have the invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by ----------,* on the basis of such audit, not to constitute allowable cost. Any payment may be reduced for overpayments, or increased for underpayments, on preceding invoices or vouchers.

(e) On receipt and approval of the invoice or voucher designated by the Contractor as the "completion invoice" or "completion voucher" and upon compliance by the Contractor with all the provisions of this contract (including, without limitation, the provisions relating to patents and the provisions of (f) below), the Government shall promptly pay to the Contractor any balance of allowable cost, and any part of the fixed fee, which has been withheld pursuant to (c) above or otherwise not paid to the Contractor. The completion invoice or voucher shall be submitted by the Contractor promptly following completion of the work under this contract but in no event later than one (1) year (or such longer period as the Contracting Officer may in his discretion approve in writing) from the date of such completion.

(f) The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government, to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract. Reasonable expenses incurred by the Contractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by the Contracting Officer. Prior to final payment under this contract, the Contractor and each assignee under this contract whose assignment is in effect at the time of final payment under this contract shall execute and deliver:

(i) An assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including any interest thereon) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(ii) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions—

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract: *Provided,* That such claims are not known to the Contractor on the date of the execution of the release: *And provided further,* That the Contractor gives notice of such claims in writing to the Contracting Officer not more than six (6) years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier; and

(C) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents.

(g) Any cost incurred by the Contractor under the terms of this contract which would constitute allowable cost under the provisions of this clause shall be included in determining the amount payable under this contract, notwithstanding any provisions contained in the specifications or other documents incorporated in this contract by reference, designating services to be performed or materials to be furnished by the Contractor at its expense or without cost to the Government.

(b) When, pursuant to § 3.404–4 of this subchapter, incentive revision of the fee in a cost-reimbursement type supply contract is to be provided, the clause set forth below shall, except as provided in paragraph (c)(5) of this section, be included in the contract. Additional instructions for use of the clause are in paragraph (c) of this section.

ALLOWABLE COST, INCENTIVE FEE, AND PAYMENT (APR. 1959)

(a)(1) For the performance of this contract, the Government shall pay to the Contractor:

(i) The cost thereof (hereinafter referred to as "allowable cost") determined by ----------* to be allowable in accordance with—

(A) Subpart B of Part 15 of this subchapter as in effect on the date of this contract; and

(B) The terms of this contract; and

(ii) A fee determined as provided in this contract.

(2) The target cost and target fee of this contract are set forth in the Schedule and shall be subject to adjustment in accordance with (h) and (i) below. As used throughout this contract the term:

(i) "Target cost" means the estimated cost of this contract initially negotiated, adjusted in accordance with (h) below; and

(ii) "Target fee" means the fee which was initially negotiated on the assumption that this contract would be performed for a cost equal to the estimated cost of this contract initially negotiated, adjusted in accordance with (h) below.

(b) Once each month (or at more frequent intervals, if approved by ----------*) the Contractor may submit to an authorized representative of ----------,* in such form and reasonable detail as such representative may require an invoice or voucher supported by a statement of cost incurred by the Contractor in the performance of this contract and claimed to constitute allowable cost.

(c)(1) As promptly as may be practicable after the receipt of each invoice or voucher and statement of cost, the Government shall, except as otherwise provided in this contract, and subject to the provisions of paragraph (d) below, make payment thereon, as approved by ----------,* to the extent of:

(i) 100 percent of such approved costs representing progress payments to subcontractors under fixed price type subcontracts: *Provided,* That such payments by the Government to the Contractor shall not exceed 70 percent of the costs incurred by such subcontractors,

(ii) 100 percent of such approval costs representing cost reimbursement to subcontractors under cost reimbursement type subcontracts: *Provided,* That for cost reimbursement type subcontracts not covered by the exceptions listed in § 3.404–3(d)(2) of this subchapter, as in effect on the date of this contract, such payments by the Government shall not exceed 80 percent of the costs incurred by such subcontractors, and

(iii) 80 percent of all other such approved costs.

The cumulative amount of such invoices or vouchers from time to time approved but not paid pursuant to the foregoing provisions (regardless of whether they are paid under the next sentence hereof) shall constitute a gross withheld payments amount. Upon acceptance and delivery of articles called for by item ------** of this contract, the Government shall pay to the Contractor an amount which, when added to any amounts previously paid under this sentence, shall be the same percentage of the gross withheld payments amount as the cumulative number of articles accepted and delivered under item ------** of this contract is of the total number of articles called for by such item.

(2) Payment of fee shall be made to the Contractor as specified in the Schedule: *Provided, however,* That after payment of ninety-five percent (95%) of the minimum fee provided for in (1) below, further payment, on account of the fee shall be withheld until a reserve of either fifteen percent (15%) of the target fee, or one hundred thousand dollars ($100,000), whichever is less, shall have been set aside.

(3) The total of the amounts which may be withheld at any one time under both (c)(1) and (c)(2) above shall not exceed the greatest amount which may then be withheld under either (c)(1) or (c)(2), whichever permits the greater withholding at that time.

(4) In the event of complete termination of the work remaining to be performed under this contract or in the event of cessation of performance pursuant to the clause of this contract entitled "Limitation of Cost," the Government shall, subject to the provisions of paragraph (d) below, pay the balance of the gross withheld payments amount to the Contractor within sixty (60) days from the effective date of termination or date of written notice to the Government that performance has been discontinued pursuant to the clause entitled "Limitation of Cost," as the case may be.

(d) At any time or times prior to final payment under this contract, ----------* may have the invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by ----------*, on the basis of such audit, not to constitute allowable cost. Any payment may be reduced for overpayments, or increased for underpayments, on preceding invoices or vouchers.

(e) On receipt and approval of the invoice or voucher designated by the Contractor as the "completion invoice" or "completion voucher" and upon compliance by the Contractor with all the provisions of this contract (including, without limitation, the provisions relating to patents and the provisions of (f) below), the Government shall promptly pay to the Contractor any balance of allowable cost, and any part of the fee, which has been withheld pursuant to (c) above or otherwise not paid to the Contractor. The completion invoice or voucher shall be submitted by the Contractor promptly following completion of the work under this contract but in no event later than one (1) year (or such longer period as the Contracting Officer may in his discretion approve in writing) from the date of such completion.

(f) The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government, to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract. Reasonable expenses incurred by the Contractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by the Contracting Officer. Prior to final payment under this contract, the Contractor and each assignee under this contract whose assignment is in effect at the time of final payment under this contract shall execute and deliver:

(i) An assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including any interest thereon) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(ii) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions—

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract: *Provided,* That such claims are not known to the Contractor on the date of the execution of the release: *And provided further,* That the Contractor gives notice of such claims in writing to the Contracting Officer not more than six (6) years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier; and

(C) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents.

Payments under the assignment and the claims excepted from the release shall be subject to adjustment by reason of the adjustment of fee in accordance with (i) below.

(g) Any cost incurred by the Contractor under the terms of this contract which would constitute allowable cost under the provisions of this clause shall be included in determining the amount payable under this contract, notwithstanding any provisions contained in the specifications or other documents incorporated in this contract by reference, designating services to be performed or materials to be furnished by the Contractor at its expense or without cost to the Government.

(h) When the work under this contract (including any supplies or services which are ordered separately under, or otherwise added to, this contract) is increased or decreased by contract modification, appropriate adjustments in the target cost and target fee shall be set forth in an amendment

or supplemental agreement to this contract.

(i) The fee payable hereunder shall be the target fee increased by (insert contractor's participation) cents for every dollar by which the total allowable cost is less than the target cost or decreased by (insert contractor's participation) cents for every dollar by which the total allowable cost exceeds the target cost. In no event shall the fee be greater than ------%, nor less than ------%, of the target cost; and within these limits such fee shall be subject to adjustment, by reason of increase or decrease of total allowable cost, on account of payments under the assignment required by (f)(1) above, and claims excepted from the release required by (f)(ii) above.

In the event the contracts call for spare parts or other supplies and services which are to be ordered under a provisioning document or Government option, the following provision (j) shall be included:

(j) Compensation for supplies (including spare parts) and services which are to be furnished under this contract pursuant to a provisioning document or Government option shall be determined in accordance with the provisions of this clause notwithstanding any inconsistent provision in such provisioning document or Government option.

(c)(1) In the foregoing clauses, insert, in contracts of the Department of the Army and the Department of the Air Force, the words, "the Contracting Officer." and insert, in contracts of the Department of the Navy the words "the Comptroller of the Navy (Contract Audit Division)" in the spaces designated by an asterisk (----------*). For approvals with regard to fixed-price type subcontracts, pursuant to paragraph (c)(1)(i) of the foregoing clauses, the standards shall be the same as those governing progress payments on fixed-price type prime contracts. For approvals with regard to cost-reimbursement type subcontracts, pursuant to paragraph (c)(1)(ii) of the foregoing clauses, the standards shall be the same as those contained in § 3.404–3(d) of this subchapter for prime contracts.

(2) In subparagraph (c)(1) of the foregoing clauses, insert the item number of the principal end item being procured under the contract in the space designated by a double asterisk (------**).

(3) In accordance with Departmental procedures, the following sentence may be substituted for the third sentence of subparagraph (c)(1) of the foregoing clauses: "Upon the completion of increments of work as specified in the Schedule, the Government shall pay to the Contractor an amount which, when added to any amounts previously paid under this sentence, shall be the same percentage of the gross withheld payments amount as the total of the completed increments is of the total increments of the work called for by this contract." Increments of work specified in the Schedule pursuant to the above provision may be stated in units, percentages of completion, stages of work, or in any other appropriate manner.

(4) In paragraph (f)(ii)(B) of the foregoing clauses, the period of years may be increased to correspond with any statutory period of limitation applicable to claims of third parties against the contractor: *Provided*, That a corresponding increase is made in the period for retention of records required in paragraph (a)(4) of the clause set forth in § 7.203–7.

(5) In all cost-reimbursement type supply contracts covered by any one of the exceptions listed in § 3.404–3(d)(2) of this subchapter, insert the appropriate one of the foregoing clauses modified as follows:

(i) If the clause set forth in paragraph (a) of this section is used, delete paragraph (c) thereof and substitute the following:

(c) Promptly after receipt of each invoice or voucher the Government shall, subject to the provisions of (d) below, make payment thereon as approved by ----------*. Payment of the fixed fee, if any, shall be made to the Contractor as specified in the Schedule: *Provided, however*, That after payment of eighty-five percent (85%) of the fixed fee set forth in the Schedule, further payment on account of the fixed fee shall be withheld until a reserve of either fifteen percent (15%) of the total fixed fee, or one hundred thousand dollars ($100,000), whichever is less, shall have been set aside.

(ii) If the clause set forth in paragraph (b) of this section is used, delete paragraph (c) thereof and substitute the following:

(c) Promptly after receipt of each invoice or voucher, the Government shall, subject to the provisions of (d) below, make payment thereon as approved by ----------*. Payment of fee shall be made to the Contractor as specified in the Schedule: *Provided, however*, That after payment of ninety-five percent (95%) of the minimum fee provided for in (i) below, further payment on account of the fee shall be withheld until a reserve of either fifteen percent (15%) of the target fee, or one hundred thousand dollars ($100,000), whichever is less, shall have been set aside.

(6) In subparagraph (c)(2) of the clauses set forth in paragraphs (a) and (b) of this section and in the (c) paragraphs set forth in subparagraph (5) of this paragraph, the percentages and amounts set forth therein may be varied in accordance with Departmental procedures, except that the percentage of minimum fee in the incentive fee clause shall not exceed 95 percent.

(7) The measure of the increase and the decrease in the fee, representing "the contractor's participation" as set forth in paragraph (i) of the incentive fee clause, shall normally be the same. Under some circumstances the use of a sliding scale may be appropriate (for example, $0.01 for the first $100, $0.02 for the next $100, etc.) in which case necessary changes in the wording of paragraph (i) of the incentive fee clause are authorized. The maximum and minimum fee shall normally be equidistant from the target fee.

(8) In the case of cost-reimbursement type supply contracts without fee:

(i) Insert the following sentence in lieu of the second sentence of paragraph (c) of the clause set forth in subparagraph (5)(i) of this paragraph: "After payment of an amount equal to eighty percent (80%) of the total estimated cost of performance of this contract set forth in the Schedule, further payment on account of allowable cost shall be withheld until a reserve of either one percent (1%) of such total estimated cost, or one hundred thousand dollars ($100,000), whichever is less, shall have been set aside"; and

(ii) Delete the words "and any part of the fixed fee" from paragraph (e) of the clause set forth in paragraph (a) of this section.

§ 7.203–5 Inspection of supplies and correction of defects.

INSPECTION OF SUPPLIES AND CORRECTION OF DEFECTS (MAY 1960)

(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance. The Contractor shall provide and maintain an inspection system acceptable to the Government covering the supplies, fabricating methods, and special tooling hereunder. The Government, through any authorized representative, may inspect the plant or plants of the Contractor or of any of its subcontractors engaged in the performance of this contract. If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide and shall require subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. All inspections and tests by the Government shall be performed in such a manner as will not unduly delay the work. Except as otherwise provided in this contract, acceptance of any supplies or lots of supplies shall be made as promptly as practicable after delivery thereof and shall be deemed to have been made no later than sixty (60) days after the date of such delivery, if acceptance has not been made earlier within such period.

(b) At any time during performance of this contract, but not later than six (6) months (or such other period as may be provided in the Schedule) after acceptance of the supplies or lots of supplies last delivered in accordance with the requirements of this contract, the Government may require the Contractor to remedy by correction or replacement, as directed by the Contracting Officer, any supplies or lots of supplies which at the time of delivery thereof are defective in material or workmanship or otherwise not in conformity with the requirements of this contract. Except as otherwise provided in paragraph (c) of this section, the cost of any such replacement or correction shall be included in Allowable Cost determined as provided in the clause of this contract entitled "Allowable Cost, Fixed Fee and Payment," but no additional fee shall be payable with respect thereto. Such supplies or lots of supplies shall not be tendered thereafter for acceptance unless the former requirement of correction is disclosed. If the Contractor fails to proceed with reasonable promptness to replace or correct such supplies or lots of supplies, the Government (1) may by contract or otherwise replace or correct such supplies and charge to the Contractor any increased cost occasioned the Government thereby, or may reduce any fixed fee payable under this contract (or require repayment of any fixed fee theretofore paid) in such amount as may be equitable under the circumstances, or (2) in the case of supplies not delivered, may require the delivery of such supplies, and shall have the right to reduce any fixed fee payable under this contract (or to require repayment of any fixed fee theretofore paid) in such amount as may be equitable under the circumstances, or (3) may terminate this contract for default as provided in the clause of this contract

entitled "Termination." Failure to agree to the amount of any such increased cost to be charged to the Contractor or to such reduction in, or repayment of, the fixed fee shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(c) Notwithstanding the provisions of paragraph (b) hereof, the Government may at any time require the correction or replacement by the Contractor, without cost to the Government, of supplies or lots of supplies which are defective in material or workmanship, or otherwise not in conformity with the requirements of this contract, if such defects or failures are due to fraud, lack of good faith or willful misconduct on the part of any of the Contractor's directors or officers, or on the part of any of his managers, superintendents, or other equivalent representatives, who has supervision or direction of (i) all or substantially all of the Contractor's business, or (ii) all or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed, or (iii) a separate and complete major industrial operation in connection with the performance of this contract. The Government may at any time also require correction or replacement by the Contractor, without cost to the Government, of any such defective supplies or lots of supplies if the defects or failures are caused by one or more individual employees selected or retained by the Contractor after any such supervisory personnel has reasonable grounds to believe that any such employee is habitually careless or otherwise unqualified.

(d) Corrected supplies or replaced supplies shall be subject to the provisions of this clause in the same manner and to the same extent as supplies originally delivered under this contract.

(e) The Contractor shall make its records of all inspection work available to the Government during the performance of this contract and for such longer period as may be specified in this contract.

(f) Except as provided in this clause and as may be provided in the Schedule, the Contractor shall have no obligation or liability to correct or replace supplies or lots of supplies which at the time of delivery are defective in material or workmanship or otherwise not in conformity with the requirements of this contract.

(g) Except as otherwise provided in the Schedule, the Contractor's obligation to correct or replace Government-furnished property (which is property in the possession of or acquired directly by the Government and delivered or otherwise made available to the Contractor) shall be governed by the provisions of the clause of this contract entitled "Government Property."

§ 7.203–6 Assignment of claims.

In accordance with the instructions set forth in § 7.103–8, insert the contract clause set forth in § 7.103–8.

§ 7.203–7 Records.

(a) Except as provided in (b) of this section and in § 6.701, insert the following clause:

RECORDS (JAN. 1960)

(a) (1) The Contractor agrees to maintain books, records, documents and other evidence pertaining to the costs and expenses of this contract (hereinafter collectively called the "records") to the extent and in such detail as will properly reflect all net costs, direct and indirect, of labor, materials, equipment, supplies and services, and other costs and expenses of whatever nature for which reimbursement is claimed under the provisions of this contract. The Contractor's accounting procedures and practices shall be subject to the approval of ------*; *Provided, however,* That no material change will be required to be made in the Contractor's accounting procedures and practices if they conform to generally accepted accounting practices and if the costs properly applicable to this contract are readily ascertainable therefrom.

(2) The Contractor agrees to make available at the office of the Contractor at all reasonable times during the period set forth in subparagraph (4) below any of the records for inspection, audit or reproduction by any authorized representative of the Department or of the Comptroller General.

(3) In the event the Comptroller General or any of his duly authorized representatives determines that his audit of the amounts reimbursed under this contract as transportation charges will be made at a place other than the office of the Contractor, the Contractor agrees to deliver, with the reimbursement voucher covering such charges or as may be otherwise specified within two years after reimbursement of charges covered by any such voucher, to such representative as may be designated for that purpose through ------* such documentary evidence in support of transportation costs as may be required by the Comptroller General or any of his duly authorized representatives.

(4) Except for documentary evidence delivered to the Government pursuant to subparagraph (3) above, the Contractor shall preserve and make available his records (i) for a period of three years from the date of final payment under this contract, and (ii) for such longer period, if any, as is required by applicable statute, by any other clause of this contract, or by (A) or (B) below.

(A) If this contract is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of three years from the date or any resulting final settlement.

(B) Records which relate to (i) appeals under the Disputes clause of this contract, (ii) litigation or the settlement of claims arising out of the performance of this contract, or (iii) cost and expenses of this contract as to which exception has been taken by the Comptroller General or any of his duly authorized representatives, shall be retained by the Contractor until such appeals, litigation, claims, or exceptions have been disposed of.

(5) Except for documentary evidence delivered pursuant to subparagraph (3) above, and the records described in subparagraph (4)(B) above, the Contractor may in fulfillment of its obligation to retain its records as required by this clause substitute photographs, microphotographs, or other authentic reproductions of such records, after the expiration of two years following the last day of the month of reimbursement to the Contractor of the invoice or voucher to which such records relate, unless a shorter period is authorized by the Contracting Officer with the concurrence of the Comptroller General or his duly authorized representative.

(6) The provisions of this paragraph (a), including this subparagraph (6), shall be applicable to and included in each subcontract hereunder which is on a cost, cost-plus-a-fixed-fee, time-and-material or labor-hour basis.

(b) The Contractor further agrees to include in each of his subcontracts hereunder, other than those set forth in subparagraph (a)(6) above, a provision to the effect that the subcontractor agrees that the Comptroller General or the Department, or any of their duly authorized representatives, shall, until the expiration of three years after final payment under the subcontract, have access to and the right to examine any directly pertinent books, documents, papers, and records of such subcontractor involving transactions related to the subcontract. The term "subcontract," as used in this paragraph (b) only, excludes (i) purchase orders not exceeding $2,500 and (ii) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

In the foregoing clause, insert, in contracts of the Department of the Army, and the Department of the Air Force, the words "the Contracting Officer," and insert, in contracts of the Department of the Navy, the words "the Comptroller of the Navy (Contract Audit Division)," in the space designated by an asterisk (----------*).

(b) In the case of contracts which establish separate periods of performance, the following alternate subparagraph (a)(4) may be substituted for the corresponding subparagraph of the clause prescribed by paragraph (a) of this section.

(4) Except for documentary evidence delivered to the Government pursuant to subparagraph (3) above, the Contractor shall preserve and make available his records (i) for a period of three years from the date of payment of the voucher or invoice submitted by the Contractor after the completion of the work performed during any separate period of performance established by this contract or by any amendment or supplemental agreement, without regard to former or subsequent periods of performance, and (ii) for such longer period, if any, as is required by applicable statute, by any other clause of this contract, or by (A), (B), or (C) below.

(A) If this contract is completely or partially terminated, the records relating to the work terminated shall be preserved and made available for a period of three years from the date of any resulting final settlement.

(B) Records which relate to (i) appeals under the Disputes clause of this contract, (ii) litigation or the settlement of claims arising out of the performance of this contract, or (iii) cost and expenses of this contract as to which exception has been taken by the Comptroller General or any of his duly authorized representatives, shall be retained by the Contractor until such appeals, litigation, claims, or exceptions have been disposed of.

(C) If the Contractor plans to destroy any records sooner than three years after the date of the voucher or invoice to be submitted after the completion of the work performed during the total of the periods of performance established by this contract and all amendments and supplemental agreements thereto, which voucher or invoice shall be designated "completion voucher" or "completion invoice," it shall give written notice to the Contracting Officer and to the Comptroller General of the United States, specifying any records which it plans to destroy after the expiration of 90 days from the receipt of such notice, and shall retain any records which either the Contracting Officer or the Comptroller General, by written notice within 90 days after receipt of the Contractor's notice, requires to be retained for a further specified period of time.

In the case of such contracts which do not contain the foregoing alternate subparagraph (a)(4), that subparagraph may be inserted by amendment, or in the alternative, the retention of records may be administered in accordance with the procedures set forth in the foregoing alternate subparagraph (a)(4).

§ 7.203–8 Subcontracts.

SUBCONTRACTS (JULY 1960)

(a) The Contractor shall give advance notification to the Contracting Officer of any proposed subcontract hereunder which (i) is on a cost or cost-plus-a-fixed-fee basis, or (ii) is on a fixed-price basis exceeding in dollar amount either $25,000 or five percent (5%) of the total estimated cost of this contract.

(b) The Contractor shall not, without the prior written consent of the Contracting Officer, place any subcontract which (i) is on a cost or cost-plus-a-fixed-fee basis, or (ii) is on a fixed-price basis exceeding in dollar amount either $25,000 or five percent (5%) of the total estimated cost of this contract, or (iii) provides for the fabrication, purchase, rental, installation or other acquisition, of any item of industrial facilities, or of special tooling having a value in excess of $1,000, or (iv) is on a time-and-material or labor-hour basis. The Contracting Officer may, in his discretion, ratify in writing any such subcontract; such action shall constitute the consent of the Contracting Officer as required by this paragraph (b).

(c) The Contractor agrees that no subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis.

(d) The Contracting Officer may, in his discretion, specifically approve in writing any of the provisions of a subcontract. However, such approval or the consent of the Contracting Officer obtained as required by this clause shall not be construed to constitute a determination of the allowability of any cost under this contract, unless such approval specifically provides that it constitutes a determination of the allowability of such cost.

(e) The Contractor shall give the Contracting Officer immediate notice in writing of any action or suit filed, and prompt notice of any claim made against the Contractor by any subcontractor or vendor which, in the opinion of the Contractor, may result in litigation, related in any way to this contract with respect to which the Contractor may be entitled to reimbursement from the Government.

(f) Notwithstanding (b) above, the Contractor may enter into subcontracts within (ii), or, if the subcontract is for special tooling, within (iii), of (b) above, without the prior written consent of the Contracting Officer if the Contracting Officer has, in writing, approved the Contractor's purchasing system and the subcontract is within the limitations of such approval.

(g) The Contractor shall (i) insert in each price redetermination or incentive price revision subcontract hereunder the substance of the "Limitation on Payments" provision set forth in paragraph (j) of the clause prescribed by paragraph 7–108 of the Armed Services Procurement Regulation, including subparagraph (4) thereof, modified to omit mention of the Government and reflect the position of the Contractor as purchaser and of the subcontractor as vendor, and to omit that portion of subparagraph (3) thereof relating to tax credits, and (ii) include in each cost-reimbursement type subcontract hereunder a requirement that each price redetermination and incentive price revision subcontract thereunder will contain the substance of the "Limitation on Payments" provision, including subparagraph (4) thereof, modified as outlined in (i) above.

In paragraph (a) of the foregoing clause, the percentage and amount set forth therein may be revised downward only in accordance with Departmental procedures. In paragraph (b) of the foregoing clause, the percentage and amount set forth in (ii) thereof may be varied, the dollar amount set forth in (iii) may be increased, and in (i) and (iv) thereof dollar amounts not in excess of $10,000 may be established below which the prior written consent of the contracting officer need not be obtained, in accordance with Departmental procedures.

§ 7.203–9 Utilization of small business concerns.

Insert the contract clause set forth in § 7.104–14, except in those contracts entered into with foreign contractors which are to be performed outside of the United States, its Territories, its posessions, and Puerto Rico.

§ 7.203–10 Termination.

Insert the contract clause set forth in § 8.702.

§ 7.203–11 Excusable delays.

Insert the clause set forth in § 8.708.

§ 7.203–12 Disputes.

Insert the contract clause set forth in § 7.103–12. In accordance with Department procedures, the foregoing clause may be modified to provide for (a) decision by the activity within a Department performing audit functions of any dispute concerning a question as to allowability of cost, and (b) intermediate appeal to the Head of the Procuring Activity concerned. The decision of the Contracting Officer or of the Activity performing the audit function shall, if mailed, be sent by certified mail, return receipt requested.

§ 7.203–13 Renegotiation.

In accordance with the requirements of § 7.103–13, insert the appropriate contract clause set forth therein.

§ 7.203–14 [Reserved]

§ 7.203–15 Convict labor.

Insert the contract clause set forth in § 12.203 of this subchapter.

§ 7.203–16 Eight-Hour Law of 1912—Overtime compensation.

Insert the contract clause set forth in § 12.303–1 of this chapter. Note the introductory provision required by § 12.303–2 of this chapter in the case of contracts with a State or political subdivision thereof.

§ 7.203–17 Walsh-Healey Public Contracts Act.

Insert the contract clause set forth in § 12.604 of this subchapter.

§ 7.203–18 Nondiscrimination in employment.

Insert the contract clause set forth in § 12.802.

§ 7.203–19 Officials not to benefit.

Insert the contract clause set forth in § 7.103–19.

§ 7.203–20 Covenant against contingent fees.

Insert the contract clause set forth in § 7.103–20.

§ 7.203–21 Government property.

Insert the contract clause set forth in § 13.503 of this subchapter.

§ 7.203–22 Insurance; liability to third persons.

INSURANCE—LIABILITY TO THIRD PERSONS (JAN. 1960)

(a) The Contractor shall procure and thereafter maintain workmen's compensation employer's liability, comprehensive general liability (bodily injury) and comprehensive automobile liability (bodily injury and property damage) insurance, with respect to performance under this contract, and such other insurance as _____[1] may from time to time require with respect to performance under this contract: *Provided*, That the Contractor may with the approval of _____[1] maintain a self-insurance program: *And provided further*, That with respect to workmen's compensation the Contractor is qualified pursuant to statutory authority. All insurance required pursuant to the provisions of this paragraph shall be in such form, in such amounts, and for such periods of time, as _____[1] may from time to time require or approve, and with insurers approved by _____[1]

(b) The Contractor agrees, to the extent and in the manner required by _____*, to submit for the approval of _____* any other insurance maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement hereunder.

(c) The Contractor shall be reimbursed: (i) For the portion allocable to this contract of the reasonable cost of insurance as required or approved pursuant to the provisions of this clause, and (ii) for liabilities to third persons for loss or damage to property (other than property (A) owned, occupied or used by the Contractor or rented to the Contractor or (B) in the care, custody, or control of the Contractor), or for death or bodily injury, not compensated by insurance or otherwise, arising out of the performance of this contract, whether or not caused by the negligence of the Contractor, its agents, servants or employees, provided such liabilities are represented by final judgments or by settlements approved in writing by the Government, and expenses incidental to such liabilities, except liabilities (i) for which the Contractor is otherwise responsible under the express terms of the clause or clauses, if any, specified in the Schedule, or (ii) with respect to which the Contractor has failed to insure as required or maintain insurance as approved by _____* or (iii) which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers, superintendents, or other equivalent representatives, who has supervision or direction of (1) all or substantially all of the Contractor's business, or (2) all or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed, or (3) a separate and complete major industrial operation in connection with the performance of this contract. The foregoing shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required to be submitted for approval or required to be procured and maintained pursuant to the provisions of this clause, provided such cost would constitute Allowable Cost under the clause of this contract entitled "Allowable Cost, Fixed Fee and Payment."

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[1] In the foregoing clause, insert, in contracts of the Department of the Army the words "the Contracting Officer," and insert, in contracts of the Department of the Navy and the Department of the Air Force, the activity designated in accordance with Departmental procedures.

(d) The Contractor shall give the Government or its representatives immediate notice of any suit or action filed, or prompt notice of any claim made, against the Contractor arising out of the performance of this contract, the cost and expense of which may be reimbursable to the Contractor under the provisions of this contract, and the risk of which is then uninsured or in which the amount claimed exceeds the amount of coverage. The Contractor shall furnish immediately to the Government copies of all pertinent papers received by the Contractor. If the amount of the liability claimed exceeds the amount of coverage, the Contractor shall authorize representatives of the Government to collaborate with counsel for the insurance carrier, if any, in settling or defending such claim. If the liability is not insured or covered by bond, the Contractor shall, if required by the Government, authorize representatives of the Government to settle or defend any such claim and to represent the Contractor in or take charge of any litigation in connection therewith: *Provided, however,* That the Contractor may, at its own expense, be associated with the representatives of the Government in the settlement or defense of any such claim or litigation.

In the foregoing clause, insert, in the contrac , of the Department of the Army and the Department of the Air Force, the words "the Contracting Officer," and insert, in the contracts of the Department of the Navy, the words "the Department," in the space designated by an asterisk (_____*).

§ 7.203–23 Authorization and consent.

Insert the contract clause set forth in § 9.102–1 of this subchapter.

§ 7.203–24 Notice and assistance regarding patent infringement.

Insert the contract clause set forth in § 9.104 of this subchapter.

§ 7.203–25 Soviet-controlled areas.

In accordance with the requirements of § 6.403 of this subchapter, insert the contract clause set forth therein.

§ 7.203–26 Utilization of concerns in labor surplus areas.

Insert the contract clause set forth in § 7.104–20 of this part, except in contracts of which the estimated cost does not exceed $5,000 and in contracts with foreign contractors which are to be performed outside the United States, its possessions, and Puerto Rico.

§ 7.203–27 Payment for overtime and shift premiums.

In accordance with the requirements of § 12.102 of this chapter, insert the contract clause set forth in § 12.102–3(c) of this chapter.

§ 7.204 Clauses to be used when applicable.

§ 7.204–1 Davis-Bacon Act.

In accordance with the requirements of Subpart D of Part 12 of this subchapter insert the applicable contract clauses set forth in § 12.403–1 or § 12.403–4 of this subchapter, as the case may be.

§ 7.204–2 Copeland Act.

In accordance with the requirements of Subpart D of Part 12 of this subchapter, insert the applicable contract clauses set forth in § 12.403–1 or § 12.403–4 of this subchapter, as the case may be.

§ 7.204–3 Buy American Act.

In accordance with the requirements of § 6.104–5 of this chapter, insert the clause set forth therein.

§ 7.204–4 Notice to the Government of labor disputes.

Insert the clause set forth in § 7.104–4 in all contracts involving the furnishing or production of any item on the Department of Defense Master Urgency List and in any other contract of a class or kind which the Head of the Procuring Activity concerned determines to be appropriate for the use of such a clause.

§ 7.204–5 Patent indemnity.

In accordance with the requirements of § 9.103 of this chapter, insert the appropriate contract clause with additional provisions as prescribed, set forth in said section.

§ 7.204–6 Filing of patent applications.

In accordance with the requirements of § 9.106 or § 9.106–1, insert either of the contract clauses set forth therein, as appropriate.

§ 7.204–7 Patent rights.

In accordance with the requirements of § 9.107 of this chapter, insert the appropriate clause with additional provisions as prescribed, set forth in said section.

§ 7.204–8 Reporting of royalties.

In accordance with the requirements of § 9.110 of this chapter, insert the contract clause set forth therein.

§ 7.204–9 Rights in data.

In accordance with the requirements of Subpart B of Part 9 of this Subchapter, insert one of the contract clauses set forth in § 9.203–1, § 9.204–2, or § 9.206 of this chapter, as appropriate. When the contract clause in § 9.203–1 of this chapter, is used, the appropriate additional provisions shall be added in accordance with the requirements of § 9.203, § 9.203–2, § 9.203–3, or § 9.203–4 of this chapter; and the additional provision in § 9.204–1 of this chapter may be added under the circumstances set forth in § 9.204–1 of this chapter.

§ 7.204–10 Quality Control System.

In accordance with the instructions in § 7.104–28 of this part, insert the contract clause set forth therein.

§ 7.204–11 Excess profit.

In accordance with the instructions set forth in § 7.104–11, insert the appropriate contract clause set forth in said section.

§ 7.204–12 Military security requirements.

In accordance with the requirements of § 7.104–12, insert the contract clause set forth in said section, deleting paragraphs (e) and (f) therefrom and substituting therefor the following paragraphs (e) and (f):

(e) If, subsequent to the date of this contract, the security classifications or security requirements under this contract are changed by the Government as provided in this clause, and if such change causes an increase or decrease in the estimated cost of performance of this contract, the estimated cost and fixed fee shall, to the extent appropriate, be subject to an equitable adjustment. Any such equitable adjustment shall be accomplished in the manner set forth in the "Changes" clause in this contract.

(f) The Contractor agrees to insert, in all subcontracts hereunder which involve access to classified information, provisions which shall conform substantially to the language of this clause, including this paragraph (f) but excluding paragraph (e) of this clause. The Contractor may insert in any such subcontract, and any such subcontract entered into thereunder may contain, in lieu of paragraph (e) of this clause, provisions which permit equitable adjustments to be made in the subcontract price or in the estimated cost and fixed fee of the subcontract (as appropriate to the type of subcontract involved) on account of changes in security classifications or requirements made under the provisions of this clause subsequent to the date of the subcontract involved.

§ 7.204–13 Preference for certain domestic commodities.

In accordance with the requirements of § 6.305 of this chapter, insert the clause set forth therein.

§ 7.204–14 Gratuities.

In accordance with the requirements of § 7.104–16, insert the contract clause set forth in said section.

§ 7.204–15 Priorities, allocations and allotments.

In accordance with the requirements of § 1.307–2 of this subchapter, insert the contract clause set forth in § 7.104–18.

§ 7.204–16 Negotiated overhead rates.

Insert the contract clause set forth in § 3.704–1 of this subchapter in all contracts with commercial concerns where negotiated overhead rates pursuant to Part 3, subpart G, are to be used.

§ 7.204–17 Cargo preference act.

In accordance with the requirements of § 1.1404(b) of this subchapter, insert one of the contract clauses set forth therein as appropriate.

§ 7.204–18 Limitation on withholding of payments.

In accordance with the instructions in § 7.104–21, insert the contract clause set forth therein.

§ 7.204–19 Defense subcontracting small business program.

In accordance with § 1.707–2(b), insert the contract clause set forth in § 7.104–22.

§ 7.204–20 Changes to make or buy program.

In accordance with the requirements of § 3.902(d) of this subchapter, insert the clause set forth therein.

§ 7.205 Additional clauses.

The following clauses shall be inserted in cost-reimbursement type supply contracts in accordance with Department procedures when it is desired to cover the subject matter thereof in such contracts.

§ 7.205–1 Alteration in contract.

The contract clause set forth in § 7.105–1 may be inserted.

§ 7.205–2 Approval of contract.

The contract clause set forth in § 7.105–2 may be inserted.

§ 7.205–4 Bill of materials.

The contract clause set forth in § 7.105–6 of this regulation may be inserted pursuant to the provisions of that section.

§ 7.205–6 Materiel inspection and receiving report.

The contract clause set forth in § 7.105–7 may be inserted to the extent authorized by Departmental procedures.

§ 7.205–7 Stop work orders.

The clause set forth in § 7.105–8 of this part, if modified by changing (a) the words "the 'Termination for Convenience' clause of this contract" to "the 'Termination' clause of this contract" and (b) the words "an equitable adjustment shall be made in the delivery schedule or contract price, or both" to "an equitable adjustment shall be made in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other provisions of the contract that may be affected," is authorized for use in any cost-reimbursement type contract under the criteria and in accordance with the instructions in § 7.105–8.

Subpart C—Clauses for Fixed-Price Research and Development Contracts

§ 7.301 Applicability.

As used throughout this subpart, the term "fixed-price research and development contract" means any contract (other than a letter contract, a notice of award, or a modification not affecting new procurement) which (i) is entered into at a fixed price in an amount exceeding $2,500 (with or without any provision for price redetermination, escalation, or other form of price revision as covered in § 3.403, of this chapter), and (ii) is for experimental, developmental, or research work. See § 3.402(b) of this chapter limiting use of fixed-price contracts for research and development work.

§ 7.302 Required clauses.

The following clause shall be inserted, as required, in all fixed-price research and development contracts, except as may otherwise be indicated in this subpart.

§ 7.302–1 Definitions.

Insert the contract clause set forth in § 7.103–1. Additional definitions may be included in such clause provided they are not inconsistent with such clause or the provisions of this subchapter.

§ 7.302–2 Payments.

PAYMENTS (JUNE 1959)

The Contractor shall be paid, upon submission of proper invoices or vouchers, the prices stipulated herein for work delivered or rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made upon acceptance of any portion of the work delivered or rendered for which a price is separately stated in the contract.

§ 7.302–3 Standards of work.

STANDARDS OF WORK (JUNE 1959)

The Contractor agrees that the performance of work and services pursuant to the requirements of this contract shall conform to high professional standards.

§ 7.302–4 Inspection.

(a) The following clause shall be used where the primary contract objective is delivery of end items other than designs, drawings or reports, except where the contracting officer determines that the use of such clause is impracticable. Where this clause is not used, the clause provided in paragraph (b) of this section shall be used.

INSPECTION (JUNE 1959)

(a) All work under this contract shall be subject to inspection and test by the Government, to the extent practicable, at all times (including the period of performance) and places, and in any event prior to acceptance. The Government through any authorized representative may inspect the premises of the Contractor or any subcontractor engaged in the performance of this contract.

(b) The Government may reject any work that is defective or otherwise not in conformity with the requirements of this contract. If the Contractor fails or is unable to correct or to replace such work, the Contracting Officer may accept such work at a reduction in price which is equitable under the circumstances. Failure to agree on the reduction in price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide, without additional charge, all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If the Government inspection or test is made at a point other than the premises of the Contractor or subcontractor, it shall be at the expense of the Government. All inspections and tests by the Government shall be performed in such a manner as not unduly to delay the work. Final inspection and acceptance or rejection of the work shall be made as promptly as practicable after delivery except as otherwise provided in this contract; but failure to inspect and accept, or reject the work shall neither relieve the Contractor from responsibility for such of the work as is not in accordance with the contract requirements nor impose liability on the Government therefor.

(d) The inspection and test by the Government of any work shall not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Except as otherwise provided in this contract, acceptance shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud.

(e) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the work hereunder. Records of all inspection work by the Contractor shall be kept complete and available to the Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract.

(b) The following clause shall be inserted in all contracts subject to this part where the clause in paragraph (a) of this section is not used.

INSPECTION (JUNE 1959)

The Government, through any authorized representatives, has the right, at all reasonable times, to inspect, or otherwise evaluate the work performed or being performed hereunder and the premises in which it is being performed. If any inspection, or evaluation is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide and shall require its subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government representatives in the performance of their duties. All inspections and evaluations shall be performed in such a manner as will not unduly delay the work.

§ 7.302–5 Assignment of claims.

In accordance with the instructions set forth in § 7.103–8, insert the contract clause set forth therein.

§ 7.302–6 Examination of records.

In negotiated fixed-price research and development contracts, insert the clause set forth in § 7.104–15 in accordance with the requirements set forth therein.

§ 7.302–7 Federal, State, and local taxes.

In accordance with the requirements of § 11.401 of this chapter, insert the contract clause set forth in §§ 11.401–1 or 11.401–2 of this chapter as appropriate.

§ 7.302–8 Utilization of small business concerns.

Insert the contract clause set forth in § 7.104–14 in all contracts in amounts exceeding $5,000, except contracts with foreign contractors which are to be performed outside the United States, its Territories, its possessions, and Puerto Rico.

§ 7.302–9 Default.

In accordance with the requirements of § 8.710 of this chapter, insert the clause set forth therein.

§ 7.302–10 Termination for convenience of the government.

In accordance with the requirements of §§ 8.701 and 8.704 of this chapter, insert the appropriate contract clause.

§ 7.302–11 Disputes.

In accordance with the instructions in § 7.103–12, insert the contract clause set forth in § 7.103–12.

§ 7.302–12 Renegotiation.

In accordance with the requirements of § 7.103–13, insert the appropriate contract clause set forth therein.

§ 7.302–13 Buy American Act.

In accordance with the requirements of § 6.104–5 of this chapter, insert the contract clause set forth therein.

§ 7.302–14 Convict labor.

In accordance with the requirements of § 12–202, insert the contract clause set forth in ASPR 12–203.

§ 7.302–15 Walsh-Healey Public Contracts Act.

In accordance with the requirements of Part 12, subpart F of this chapter, in-

sert the contract clause set forth in § 12.604 of this chapter.

§ 7.302–16 Eight-hour law of 1912—overtime compensation.

In accordance with the instructions of § 12.303 of this chapter, insert the clause set forth therein.

§ 7.302–17 Nondiscrimination in employment.

In accordance with the requirements of § 12.802 of this chapter, insert the contract clause set forth therein.

§ 7.302–18 Officials not to benefit.

Insert the contract clause set forth in § 7.103–19.

§ 7.302–19 Covenant against contingent fees.

Insert the contract clause set forth in § 7.103–20.

§ 7.302–20 Gratuities.

In accordance with the requirements of § 7.104–16, insert the contract clause set forth therein.

§ 7.302–21 Authorization and consent.

In accordance with the requirements of § 9.102 of this chapter, insert the appropriate contract clause set forth therein.

§ 7.302–22 Notice and assistance regarding patent infringement.

In accordance with the requirements of § 9.104 of this chapter, insert the contract clause set forth therein.

§ 7.302–23 Patent rights.

In accordance with the requirements of § 9.107 of this chapter, insert the appropriate contract clause set forth therein with additional or alternate paragraphs as prescribed therein. However, in the case of contracts awarded on the basis of no profit, the percentage amount specified to be withheld under paragraph (*f*) of the clause set forth in § 9.107–2 of this chapter, or paragraphs (*c*) and (*d*) of the clause set forth in § 9.107–3 of this chapter, may be changed from "ten percent (10%)" to "one percent (1%)."

§ 7.302–24 Basic data clause.

In accordance with the requirements of § 9.202 of this chapter, insert the clause set forth in § 9.203–1 of this chapter with appropriate additional or alternate paragraphs as prescribed by the instructions in §§ 9.203 and 9.204–1 of this chapter.

§ 7.302–25 Military security requirements.

(a) Except as provided in paragraph (b) of this section, insert the contract clause prescribed by § 7.104–12: *Provided*, That the clause may be modified in accordance with § 7.104–12 with respect to contracts outside the United States, its Territories, its possessions, and Puerto Rico, with respect to additional security safeguards.

(b) In any research and development contract with an educational institution when the contract is awarded on the basis of no profit, insert the clause set forth in § 7.402–24(b), except that such clause may be appropriately modified for contracts to be performed outside the United States, its Territories, its possessions, and Puerto Rico.

(c) The contracting officer or his authorized representative shall prepare and transmit to the contractor and the Government representative having security cognizance over the contract involved a Security Requirements Check List (DD Form 254) or other written notification, in accordance with § 16.811 of this chapter.

§ 7.302–26 Utilization of labor surplus area concerns.

Insert the contract clause set forth in § 7.104–20, except in contracts of which the contract price does not exceed $5,000 and in contracts with foreign contractors which are to be performed outside the United States, its Territories, its possessions, and Puerto Rico.

§ 7.303 Clauses to be used when applicable.

§ 7.303–1 Clauses for contracts involving construction work.

In accordance with the requirements of § 12.403 of this chapter, insert the clauses entitled:

Davis-Bacon Act.
Eight-Hours Laws—Overtime Compensation.
Apprentices.
Payroll Records and Payrolls.
Copeland ("Anti-Kickback") Act.
Withholding of Funds To Assure Wage Payment.
Subcontracts—Termination.

§ 7.303–2 Filing of patent applications.

In accordance with the requirements of § 9.106 of this chapter, insert the contract clause set forth in § 9.106 or § 9.106–1 of this chapter, as appropriate.

§ 7.303–3 Reporting of royalties.

In accordance with the requirements of § 9.110 of this chapter, insert the contract clause set forth therein.

§ 7.303–4 Excess profit.

In accordance with the requirements of § 7.104–11, insert the appropriate contract clause set forth therein.

§ 7.303–5 Preference for certain domestic commodities.

In accordance with the requirements of § 6.305 of this chapter, insert the contract clause set forth therein.

§ 7.303–6 Priorities, allocations, and allotments.

In accordance with the requirements of § 1.307–2 of this chapter, insert the contract clause set forth in § 7.104–18.

§ 7.303–7 Government-furnished property.

In accordance with the requirements set forth in §§ 13.502 and 13.505 of this chapter, insert the appropriate contract clause.

§ 7.303–8 Soviet-controlled areas.

In accordance with the requirements of § 6.403 of this chapter, insert the contract clause set forth therein.

§ 7.303–9 Notice to the Government of labor disputes.

Insert the clause set forth in § 7.104–4 in all contracts involving the furnishing or production of any item on the Department of Defense Master Urgency List and in any other contract of a class or kind which the Head of the Procuring Activity concerned determines to be appropriate for the use of such a clause.

§ 7.303–10 Limitation on withholding of payments.

Insert the clause in § 7.104–21(a) when required by § 7.104–21.

§ 7.303–11 Defense subcontracting small business program.

In accordance with § 1.707–2(b), insert the contract clause set forth in § 7.104–22.

§ 7.303–12 Subcontracts.

In accordance with the requirements of § 3.903–1 of this chapter, insert an appropriate Subcontracts clause.

§ 7.303–13 Changes to make or buy program.

In accordance with the requirements of § 3.902(d) of this subchapter, insert the clause set forth therein.

§ 7.303–14 Payment for overtime and shift premiums.

In accordance with the requirements of § 12.102 of this chapter, insert the contract clause set forth in § 12.102–3(c) of this chapter.

§ 7.303–15 Quality Control System.

In accordance with the instructions in § 7.104–28 of this part, insert the contract clause set forth therein.

§ 7.304 Additional clauses.

The following clauses shall be inserted in accordance with Departmental procedures where it is desired to cover the subject matter thereof in such contracts.

§ 7.304–1 Changes.

CHANGES (JUNE 1959)

The Contracting Officer may at any time, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, (ii) method of shipment or packing, (iii) place of inspection, delivery, or acceptance, and (iv) the amount of Government-furnished property. If any such change causes an increase or decrease in the cost of, or the time required for performance of, this contract, or otherwise affects any other provisions of this contract, whether changed or not changed by any such order, an equitable adjustment shall be made (i) in the contract price or time of performance, or both, and (ii) in such other provisions of the contract as may be so affected, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change; *Provided, however*, That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the

clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

In the foregoing clause, the period of "thirty (30) days" within which any claim for adjustment must be asserted, may be varied in accordance with Departmental procedures.

§ 7.304–2 Alterations in contract.

The contract clause set forth in § 7.105–1 may be inserted.

§ 7.304–3 Approval of contract.

The contract clause set forth in § 7.105–2 may be inserted.

§ 7.304–4 Bill of materials.

The contract clause set forth in § 7.105–6 may be inserted pursuant to the provisions of said paragraph.

§ 7.304–5 Notice of shipments.

The contract clause set forth in § 7.105.4 may be inserted.

§ 7.304–6 Stop work orders.

The clause set forth in § 7.105–8 of this part is authorized for use under the criteria and in accordance with the instructions in § 7.105–8.

§ 7.304–7 Reports of work.

In accordance with the instructions in § 7.404–6, the contract clause set forth therein may be inserted.

Subpart D—Clauses for Cost-Reimbursement Type Research and Development Contracts

§ 7.400 Scope of subpart.

This subpart sets forth uniform contract clauses for use in cost-reimbursement type research and development contracts as defined in § 7.401.

§ 7.401 Applicability.

As used throughout this subpart, the term "cost-reimbursement type research and development contract" shall mean any contract (other than a letter contract, notice of award, or modification not effecting new procurement) which (i) is entered into on a cost, cost-sharing, or cost-plus-a-fee basis as covered in § 3.404, and (ii) is for experimental, developmental, or research work.

§ 7.402 Required clauses.

The following clauses shall be inserted, as required, in all cost-reimbursement type research and development contracts.

§ 7.402–1 Definitions.

Insert the contract clause set forth in § 7.103–1. Additional definitions may be included in such clause: *Provided,* They are not inconsistent with such clause or the provisions of this subchapter.

§ 7.402–2 Limitation of cost.

LIMITATION OF COST

(a) It is estimated that the total cost to the Government, exclusive of any fixed fee, for the performance of this contract will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use its best efforts to perform the work specified in the Schedule, and all obligations under this contract within such estimated cost. If at any time the Contractor has reason to believe that the costs which it expects to incur in the performance of this contract in the next succeeding sixty (60) days, when added to all costs previously incurred, will exceed seventy-five percent (75%) of the estimated cost then set forth in the Schedule, or if at any time, the Contractor has reason to believe that the total cost to the Government, exclusive of any fixed fee, for the performance of this contract will be substantially greater or less than the then estimated cost thereof, the Contractor shall notify the Contracting Officer in writing to that effect, giving the revised estimate of such total cost for the performance of this contract.

(b) The Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, and the Contractor shall not be obligated to continue performance under the contract or to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. When and to the extent that the estimated cost set forth in the Schedule has been increased, any costs incurred by the Contractor in excess of such estimated cost prior to the increase in estimated cost shall be allowable to the same extent as if such costs had been incurred after such increase in estimated cost.

The words "exclusive of any fixed fee," occurring twice in paragraph (a) of the foregoing clause, may be deleted in any contract not providing for the payment of a fixed fee. The words "Task Order" or other appropriate designation may be substituted, as appropriate, for the word "Schedule," occurring twice in each of paragraphs (a) and (b) of the foregoing clause.

Where the contract is of the installment type, the above clause may be appropriately modified in accordance with Departmental procedures.

§ 7.402–3 Allowable cost, fixed fee, and payment. (Feb. 1959).

(a) Subject to the instructions set forth in (b) below, insert the following clause in those contracts covered by any of the exceptions listed in § 3.404–3 (d) (2)

ALLOWABLE COST, FIXED FEE, AND PAYMENT

(a) For the performance of this contract, the Government shall pay to the Contractor:

(i) The cost thereof (hereinafter referred to as "allowable cost") determined by -----* to be allowable in accordance with—

(A) Subpart B of Part 15 of this Subchapter as in effect on the date of this contract; and

(B) the terms of this contract; and

(ii) Such fixed fee, if any, as may be provided for in the Schedule.

(b) Once each month (or at more frequent intervals, if approved by ----------*) the Contractor may submit to an authorized representative of ----------*, in such form and reasonable detail as such representative may require, an invoice or public voucher supported by a statement of cost incurred by the Contractor in the performance of this contract and claimed to constitute allowable cost.

(c) Promptly after receipt of each invoice or voucher the Government shall, subject to the provisions of (d) below, make payment thereon as approved by ----------*. Payment of the fixed fee, if any, shall be made to the Contractor as specified in the Schedule: *Provided, however,* That after payment of eighty-five percent (85%) of the fixed fee set forth in the Schedule, further payment on account of the fixed fee shall be withheld until a reserve of either fifteen percent (15%) of the total fixed fee, or one hundred thousand dollars ($100,000), whichever is less, shall have been set aside.

(d) At any time or times prior to final payment under this contract----------* may have invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by----------*, on the basis of such audit, not to constitute allowable cost. Any payment may be reduced for overpayments, or increased for underpayments, on preceding invoices or vouchers.

(e) On receipt and approval of the invoice or voucher designated by the Contractor as the "completion invoice" or "completion voucher" and upon compliance by the Contractor with all the provisions of this contract (including, without limitation, the provisions relating to patents and the provisions of (f) below, the Government shall promptly pay to the Contractor any balance of allowable cost, and any part of the fixed fee which has been withheld pursuant to (c) above or otherwise not paid to the Contractor. The completion invoice or voucher shall be submitted by the Contractor promptly following completion of the work under this contract but in no event later than one (1) year (or such longer period as the Contracting Officer may in his discretion approve in writing) from the date of such completion.

(f) The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government, to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract. Reasonable expenses incurred by the Contractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by the Contracting Officer. Prior to final payment under this contract, the Contractor and each assignee under this contract whose assignment is in effect at the time of final payment under this contract shall execute and deliver:

(i) An assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including any interest thereon) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(ii) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions—

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract; *provided* that such claims are not known to the Contractor on the date of the execution of the release: *And provided further,* That the Contractor gives notice of such claims in writing to the Contracting Officer not more than six (6) years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier; and

(C) Claims for reimbursement of costs (other than expenses of the contractor by reason of any indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents.

(g) Any cost incurred by the Contractor under the terms of this contract which would constitute allowable cost under the provisions of this clause shall be included in determining the amount payable under this contract, notwithstanding any provisions contained in the specifications or other documents incorporated in this contract by reference, designating services to be performed or materials to be furnished by the Contractor at its expense or without cost to the Government.

(b) (1) In the foregoing clause, insert, in contracts of the Department of the Army and the Department of the Air Force, the words, "the Contracting Officer," and insert, in contracts of the Department of the Navy the words "the Comptroller of the Navy (Contract Audit Division)" in the spaces designated by an asterisk (_____*).

(2) In subparagraph (f) (ii) (B) of the foregoing clause, the period of years may be increased to correspond with any statutory period of limitation applicable to claims of third parties against the contractor: *Provided,* That a corresponding increase is made in the period for retention of records required in subparagraph (a) (4) of the clause prescribed by § 7.402–7.

(3) In paragraph (c) of the foregoing clause, the percentages and amounts set forth therein may be varied in accordance with Departmental procedures.

(4) In the case of contracts without fee:

(i) Insert the following sentence in lieu of the second sentence of paragraph (c) of the foregoing clause—"After payment of an amount equal to eighty percent (80%) of the total estimated cost of performance of this contract set forth in the Schedule, further payment on account of allowable cost shall be withheld until a reserve of either one percent (1%) of such total estimated cost, or one hundred thousand dollars ($100,000), whichever is less, shall have been set aside";

(ii) Change the title of the clause set forth in (a) above to "Allowable Cost and Payment";

(iii) Change paragraph (a) of the clause set forth in (a) above, as follows: "(a) For the performance of this contract, the Government shall pay to the Contractor the cost thereof (hereinafter referred to as 'allowable cost') determined by _____* to be allowable in accordance with:

(i) Subpart B of Part 15 of this subchapter as in effect on the date of this contract; and

(ii) The terms of this contract."; and

(iv) Delete, from paragraph (e) of the clause set forth in (a) above, the words "and any part of the fixed fee" and the comma immediately before such words.

(5) In the case of contracts without fee with nonprofit institutions, the words "ten thousand dollars ($10,000)" may be substituted for the words "one hundred thousand dollars ($100,000)" as they appear in the sentence set forth in (4) (i) above.

(6) In the case of contracts with educational institutions, the reference in the alternate paragraph (a) of the foregoing clause, set forth in (4) (iii) above, to "Part 2 of Section XV" shall be deleted, and, in lieu thereof, reference shall be made to "Part 3 of Section XV".

(7) In the foregoing clause, the words "Task Order" or other appropriate designation may be substituted for the word "Schedule" as appropriate.

(c) Subject to the instructions set forth, or referred to, in (d) below, insert the following clause except in those contracts covered by any of the exceptions listed in § 3.404–3 (d) (2).

ALLOWABLE COST, FIXED FEE, AND PAYMENT (JULY 1960)

(a) For the performance of this contract, the Government shall pay to the Contractor:

(i) The cost thereof (hereinafter referred to as "allowable cost") determined by _____* to be allowable in accordance with—

(A) Subpart B of Part 15 of this Subchapter as in effect on the date of this contract; and

(B) The terms of this contract; and

(ii) Such fixed fee, if any, as may be provided for in the Schedule.

(b) Once each month (or at more frequent intervals, if approved by _____*) the Contractor may submit to an authorized representative of _____*, in such form and reasonable detail as such representative may require, an invoice or public voucher supported by a statement of cost incurred by the Contractor in the performance of this contract and claimed to constitute allowable cost.

(c) (1) As promptly as may be practicable after the receipt of each invoice or voucher and statement of cost, the Government shall, except as otherwise provided in this contract, and subject to the provisions of paragraph (d) below, make payment thereon, as approved by _____*, to the extent of:

(i) 100 percent of such approved costs representing progress payments to subcontractors under fixed price type subcontracts, *provided* that such payments by the Government to the Contractor shall not exceed 70 percent of the costs incurred by such subcontractors,

(ii) 100 percent of such approved costs representing cost reimbursement to subcontractors under cost reimbursement type subcontracts, *provided* that for cost reimbursement type subcontracts not covered by the exceptions listed in § 3.404–3(d) (2) of this Subchapter, as in effect on the date of this contract, such payments by the Government shall not exceed 80 percent of the costs incurred by such subcontractors, and

(iii) 80 percent of all other such approved costs.

The cumulative amount of such invoices or vouchers from time to time approved but not paid pursuant to the foregoing provisions (regardless of whether they are paid under the next sentence hereof) shall constitute a gross withheld payments amount. Upon acceptance and delivery of articles called for by item _____** of this contract, the Government shall pay to the Contractor an amount which, when added to any amounts previously paid under this sentence, shall be the same percentage of the gross withheld payments amount as the cumulative number of articles accepted and delivered under item _____** of this contract is of the total number of articles called for by such item.

(2) Payment of the fixed fee, if any, shall be made to the Contractor as specified in the Schedule: *Provided, however,* That after payment of eighty-five percent (85%) of the fixed fee set forth in the Schedule, further payment on account of the fixed fee shall be withheld until a reserve of either fifteen percent (15%) of the total fixed fee, or one hundred thousand dollars ($100,000), whichever is less, shall have been set aside.

(3) The total of the amounts which may be withheld at any one time under both (c) (1) and (c) (2) above shall not exceed the greatest amount which may then be withheld under either (c) (1) or (c) (2), whichever permits the greater withholding at that time.

(4) In the event of complete termination of the work remaining to be performed under this contract or in the event of cessation of performance pursuant to the clause of this contract entitled "Limitation of Cost," the Government shall, subject to the provisions of paragraph (d) below, pay the balance of the gross withheld payments amount to the Contractor within sixty (60) days from the effective date of termination or date of written notice to the Government that performance has been discontinued pursuant to the clause entitled "Limitation of Cost," as the case may be.

(d) At any time or times prior to final payment under this contract _____* may have the invoices or vouchers and statements of cost audited. Each payment theretofore made shall be subject to reduction for amounts included in the related invoice or voucher which are found by _____*, on the basis of such audit, not to constitute allowable cost. Any payment may be reduced for overpayments, or increased for underpayments, on preceding invoices or vouchers.

(e) On receipt and approval of the invoice or voucher designated by the Contractor as the "completion invoice" or "completion voucher" and upon compliance by the Contractor with all the provisions of this contract (including, without limitation, the provisions relating to patents and the provisions of (f) below), the Government shall promptly pay to the Contractor any balance of allowable cost, and any part of the fixed fee, which has been withheld pursuant to (c) above or otherwise not paid to the Contractor. The completion invoice or voucher shall be submitted by the Contractor promptly following completion of the work under this contract but in no event later than one (1) year (or such longer period as the Contracting Officer may in his discretion approve in writing) from the date of such completion.

(f) The Contractor agrees that any refunds, rebates, credits, or other amounts (including any interest thereon) accruing to or received by the Contractor or any assignee under this contract shall be paid by the Contractor to the Government, to the extent that they are properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract. Reasonable expenses incurred by the Contractor for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable costs hereunder when approved by the Contracting Officer. Prior to final payment under this contract, the Contractor and each assignee under this contract whose assignment is in effect at the time of final payment under this contract shall execute and deliver:

(i) An assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including any interest thereon) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(ii) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions—

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract; *provided* that such claims are not known to the Contractor on the date of the execution of the release: *And provided further,* That the Contractor gives notice of such claims in writing to the Contracting Officer not more than six (6) years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier; and

(C) Claims for reimbursement of costs (other than expenses of the Contractor by reason of any indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents.

(g) Any cost incurred by the Contractor under the terms of this contract which would constitute allowable cost under the provisions of this clause shall be included in determining the amount payable under this contract, notwithstanding any provisions contained in the specifications or other documents incorporated in this contract by reference, designating services to be performed or materials to be furnished by the Contractor at its expense or without cost to the Government.

(d)(1) In the clause in (c) above, insert, in contracts of the Department of the Army and the Department of the Air Force, the words, "the Contracting Officer," and insert, in contracts of the Department of the Navy, the words, "the Comptroller of the Navy (Contract Audit Division)" in the spaces designated by an asterisk (*). In subparagraph (c)(1) of the clause in (c) above, insert the item number of the principal end item being procured under the contract in the space designated by a double asterisk (**).

(2) In accordance with Departmental procedures, the following sentence may be substituted for the third sentence of subparagraph (c)(1) of the clause in (c) above:

Upon the completion of increments of work as specified in the Schedule, the Government shall pay to the Contractor an amount which, when added to any amounts previously paid under this sentence, shall be the same percentage of the gross withheld payments amount as the total of the completed increments is of the total increments of the work called for by this contract.

Increments of work specified in the Schedule pursuant to the above provision may be stated in units, percentages of completion, stages of work, or in any other appropriate manner.

(3) In subparagraph (c)(2) of the clause set forth in (c) above, the percentages and amounts may be varied in accordance with Departmental procedures.

(4) The instructions set forth in paragraph (b) (1), (2) and (7) of this section, relating to the clause set forth in (a) of this section, apply with equal force to the clause set forth in paragraph (c) of this section.

§ 7.402–4 Standards of work.

STANDARDS OF WORK (FEB. 1959)

The Contractor agrees that the performance of work and services pursuant to the requirements of this contract shall conform to high professional standards.

§ 7.402–5 Inspection and correction of defects.

(a)(1) The following clause shall be used where the primary contract objective is the delivery of end items other than designs, drawings, or reports, except where the contracting officer determines that the use of such clause is impracticable.

INSPECTION AND CORRECTION OF DEFECTS (MAY 1960)

(a) All work under this contract shall be subject to inspection and test by the Government (to the extent practicable) at all times (including the period of performance) and places, and in any event prior to acceptance. The Contractor shall provide and maintain an inspection system acceptable to the Government covering the work hereunder. The Government, through any authorized representative, may inspect the plant or plants of the Contractor or of any of its subcontractors engaged in the performance of this contract. If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide and shall require subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. All inspections and tests by the Government shall be performed in such a manner as will not unduly delay the work. Except as otherwise provided in this contract, final inspection, and acceptance shall be made at the place of delivery as promptly as practicable after delivery and shall be deemed to have been made no later than ninety (90) days after the date of such delivery, if acceptance has not been made earlier within such period.

(b) At any time during performance of this contract, but not later than six (6) months (or such other period as may be provided in the Schedule) after acceptance of all of the end items (other than designs, drawings, or reports) to be delivered under this contract, the Government may require the Contractor to remedy by correction or replacement, as directed by the Contracting Officer, any failure by the Contractor to comply with the requirements of this contract. Any time devoted to such correction or replacement shall not be included in the computation of the period of time specified in the preceding sentence, except as provided in (d) below. Except as otherwise provided in paragraph (c) below, the allowability of the cost of any such replacement or correction shall be determined as provided in the clause of this contract entitled "Allowable Cost, Fixed Fee, and Payment," but no additional fee shall be payable with respect thereto. Corrected articles shall not be tendered again for acceptance unless the former tender and the requirement of correction is disclosed. If the Contractor fails to proceed with reasonable promptness to perform such replacement or correction, the Government (i) may by contract or otherwise perform such replacement or correction and charge to the Contractor any increased cost occasioned the Government thereby, or may reduce any fixed fee payable under this contract (or require repayment of any fixed fee theretofore paid) in such amount as may be equitable under the circumstances, or (ii) in the case of articles not delivered, may require the delivery of such articles, and shall have the right to reduce any fixed fee payable under this contract (or to require repayment of any fixed fee theretofore paid) in such amount as may be equitable under the circumstances, or (iii) may terminate this contract for default. Failure to agree to the amount of any such increased cost to be charged to the Contractor or to such reduction in, or repayment of, the fixed fee shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(c) Notwithstanding the provisions of paragraph (b) above, the Government may at any time require the Contractor to remedy by correction or replacement, without cost to the Government, any failure by the Contractor to comply with the requirements of this contract if such failure is due to fraud, lack of good faith or willful misconduct on the part of any of the Contractor's directors or officers, or on the part of any of his managers, superintendents, or other equivalent representatives, who has supervision or direction of (i) all or substantially all of the Contractor's business, or (ii) all or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed, or (iii) a separate and complete major industrial operation in connection with the performance of this contract. The Government may at any time also require the Contractor to remedy by correction or replacement, without cost to the Government, any such failure caused by one or more individual employees selected or retained by the Contractor after any such supervisory personnel has reasonable grounds to believe that any such employee is habitually careless or otherwise unqualified.

(d) The provisions of paragraph (b) above shall apply to any corrected or replacement end item or component until six months after its acceptance.

(e) The Contractor shall make its records of all inspection work available to the Government during the performance of this contract and for such longer period as may be specified in this contract.

(f) Except as provided in this clause and as may be provided in the Schedule, the Contractor shall have no obligation or liability to correct or replace articles which at the time of delivery are defective in material or workmanship or otherwise not in conformity with the requirements of this contract.

(g) Except as otherwise provided in the Schedule, the Contractor's obligation to correct or replace Government-furnished property (which is property in the possession of or acquired directly by the Government and delivered or otherwise made available to the Contractor) shall be governed by the provisions of the clause of this contract entitled "Government Property."

(2) In the foregoing clause, the words "Task Order" or other appropriate designation may be substituted for the word "Schedule", as appropriate.

(3) In contracts not providing for payment of a fee, insert the following in lieu of paragraph (b) of the clause set forth in (1) above.

(b) At any time during performance of this contract, but not later than six (6) months (or such other period as may be provided in the Schedule) after acceptance of all of the end items (other than designs, drawings, or reports) to be delivered under this contract, the Government may require the Contractor to remedy by correction or replacement, as directed by the Contracting Officer, any failure by the Contractor to comply with the requirements of this contract. Any time devoted to such correction or replacement shall not be included in the computation of the period of time specified in the preceding sentence except as provided in (d) below. Except as provided in paragraph (c) below, the allowability of the cost of any such replacement or correction shall be as provided in the clause of this contract entitled "Allowable Cost and Payment". Corrected articles shall not be tendered again for acceptance unless the former tender and

the requirement of correction is disclosed. If the Contractor fails to proceed with reasonable promptness to perform such replacement or correction, the Government (i) may by contract or otherwise perform such replacement or correction and charge to the Contractor any increased cost occasioned the Government thereby, or (ii) in the case of articles not delivered, may require the delivery of such articles, or (iii) may terminate this contract for default. Failure to agree to the amount of any such increased cost to be charged to the Contractor shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes".

(b) The following clause shall be inserted in all contracts subject to this Subpart where the clause set forth in (a)(1) above is not used.

INSPECTION (FEB. 1959)

The Government, through any authorized representatives, has the right at all reasonable times, to inspect, or otherwise evaluate the work performed or being performed hereunder and the premises in which it is being performed. If any inspection, or evaluation is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide and shall require its subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government representatives in the performance of their duties. All inspections and evaluations shall be performed in such a manner as will not unduly delay the work.

§ 7.402–6 Assignment of claims.

In accordance with the instructions in § 7.103–8, insert the contract clause set forth therein.

§ 7.402–7 Records.

(a) In accordance with the instructions in § 7.203–7, insert the contract clause set forth therein. In the case of contracts which establish separate periods of performance but which do not contain the alternate subparagraph (a)(4) authorized by § 7.203–7(b), such subparagraphs may be inserted by amendment or, in the alternative, the retention of records may be administered in accordance with the procedure set forth in the alternate subparagraph (a)(4) of the clause prescribed by § 7.203–7(a).

(b) In the case of research and development contracts with nonprofit institutions and subcontracts thereunder, and pursuant to procedures approved by the Comptroller General, original documentary evidence in support of costs of the transportation of things will not be required pursuant to paragraph (a)(3) of said clause.

§ 7.402–8 Subcontracts.

(a) Subject to the instructions set forth in paragraph (b) of this section, and except as provided in paragraph (c) of this section with respect to contracts without fee with educational and nonprofit institutions, insert the following clause.

SUBCONTRACTS (JULY 1960)

(a) The Contractor shall give advance notification to the Contracting Officer of any proposed subcontract hereunder which (i) is on a cost or cost-plus-a-fixed-fee basis, or (ii) is on a fixed-price basis exceeding in dollar amount either $25,000 or five percent (5%) of the total estimated cost of this contract.

(b) The Contractor shall not, without the prior written consent of the Contracting Officer, place any subcontract which (i) is on a cost or cost-plus-a-fixed-fee basis, or (ii) is on a fixed-price basis exceeding in dollar amount either $25,000 or five percent (5%) of the total estimated cost of this contract, or (iii) provides for the fabrication, purchase, rental, installation, or other acquisition, of any item of industrial facilities, or of special tooling having a value in excess of $1,000, or (iv) is on a time-material or labor-hour basis, or (v) has experimental, developmental, or research work as one of its purposes. The Contracting Officer may, in his discretion, ratify in writing any such subcontract; such action shall constitute the consent of the Contracting Officer as required by this paragraph (b).

(c) The Contractor agrees that no subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis.

(d) The Contracting Officer may, in his discretion, specifically approve in writing any of the provisions of a subcontract. However, such approval or the consent of the Contracting Officer obtained as required by this clause shall not be construed to constitute a determination of the allowability of any cost under this contract, unless such approval specifically provides that it constitutes a determination of the allowability of such cost.

(e) The Contractor shall give the Contracting Officer immediate notice in writing of any action or suit filed, and prompt notice of any claim made against the Contractor by any subcontractor or vendor which, in the opinion of the Contractor, may result in litigation, related in any way to this contract with respect to which the Contractor may be entitled to reimbursement from the Government.

(f) Notwithstanding (b) above, the Contractor may enter into subcontracts within (ii), or, if the subcontract is for special tooling, within (iii), of (b) above, without the prior written consent of the Contracting Officer if the Contracting Officer has, in writing, approved the Contractor's purchasing system and the subcontract is within the limitations of such approval.

(g) The Contractor shall (i) insert in each price redetermination or incentive price revision subcontract hereunder the substance of the "Limitation on Payments" provision set forth in paragraph (j) of the clause prescribed by paragraph 7–108 of the Armed Services Procurement Regulation, including subparagraph (4) thereof, modified to omit mention of the Government and reflect the position of the Contractor as purchaser and of the subcontractor as vendor, and to omit that portion of subparagraph (3) thereof relating to tax credits, and (ii) include in each cost-reimbursement type subcontract hereunder a requirement that each price redetermination and incentive price revision subcontract thereunder will contain the substance of the "Limitation on Payments" provision, including subparagraph (4) thereof, modified as outlined in (i) above.

(b) In paragraph (a) of the foregoing clause, the percentage and amount set forth therein may be revised downward only in accordance with Departmental procedures. In paragraph (b) of the foregoing clause, the percentage and amount set forth in (ii) thereof may be varied, the dollar amount set forth in (iii) may be increased, and, in (i), (iv), and (v) thereof, dollar amounts not in excess of $10,000 may be established below which the prior written consent of the contracting officer need not be obtained, in accordance with Departmental procedures.

(c) In contracts without fee with educational institutions, insert the following paragraph in lieu of paragraph (b) of the clause set forth in paragraph (a) of this section, and change (iii) in paragraph (f) to (iv).

(b) The Contractor shall not, without the prior written consent of the Contracting Officer, place any subcontract which (i) is on a cost-plus-a-fixed-fee basis, or (ii) is on a fixed-price basis exceeding in dollar amount either $25,000 or five percent (5%) of the total estimated cost of this contract, or (iii) provides for the construction, purchase, rental, installation, or other acquisition of nonseverable industrial facilities, or (iv) provides for the fabrication, purchase, rental, installation or other acquisition, of any item of either (A) severable industrial facilities having a value in excess of $1,000 or the amount, if any, specified in the Schedule or Task Order, whichever is the lesser, or (B) special tooling having a value in excess of $1,000, or (v) is on a time-material or labor-hour basis, or (vi) has experimental, developmental, or research work as one of its purposes. The Contracting Officer may, in his discretion, ratify in writing any such subcontract; such action shall constitute the consent of the Contracting Officer required by this paragraph (b). (Oct. 1959).

In the foregoing paragraph (b), the percentage and amount set forth in (ii) thereof may be varied and, in (i), (v), and (vi) thereof, dollar amounts not in excess of $10,000 may be established below which the prior written consent of the contracting officer need not be obtained, in accordance with Departmental procedures. In (iv) thereof, the $1,000 limit may, in the discretion of the contracting officer, be decreased where it is determined to be in the interest of the Government, in view of such circumstances of each particular contract, as, for example, the nature of the contractor's operations, previous experience with the contractor on comparable procurements, the accounting and purchasing systems of the contractor, accounting and supply systems of the procurement activity, and the capability of the procuring activity to effect close surveillance of the contractor's purchasing and accounting practices. Also, in the discretion of the contracting officer, the cumulative total of such acquisitions of severable industrial facilities may be limited to a stated dollar amount or an amount equal to a stated percentage of the estimated cost beyond which the contractor will be required to obtain written consent of the contracting officer for any additional acquisitions of such facilities. With respect to special tooling, the $1,000 limit may be increased.

§ 7.402–9 Utilization of small business concerns.

Insert the contract clause set forth in § 7.104–14, except in contracts of which the estimated cost does not exceed $5,000 and in contracts with foreign contractors which are to be performed outside the United States, its Territories, its possessions, and Puerto Rico.

§ 7.402–10 Termination.

In accordance with the requirements of §§ 8.702 and 8.704, insert the appropriate contract clause.

§ 7.402–11 Disputes.

In accordance with the instructions in § 7.203–12, insert the clause set forth in § 7.103–12.

§ 7.402–12 Renegotiation.

In accordance with the requirements of § 7.103–13, insert the appropriate contract clause set forth therein.

§ 7.402–13 Buy American Act.

In accordance with the requirements of § 6.104–5, insert the contract clause set forth therein.

§ 7.402–14 Convict labor.

In accordance with the requirements of § 12.202, insert the contract clause set forth in § 12.203.

§ 7.402–15 Walsh-Healey Public Contracts Act.

In accordance with the requirements of Part 12, Subpart F of this Subchapter, insert the contract clause set forth in § 12.604.

§ 7.402–16 Eight-Hour Law of 1912—Overtime compensation.

In accordance with the instructions of § 12.303, insert the clause set forth therein.

§ 7.402–17 Nondiscrimination in employment.

In accordance with the requirements of § 12.802, insert the contract clause set forth therein.

§ 7.402–18 Officials not to benefit.

Insert the contract clause set forth in § 7.103–19.

§ 7.402–19 Covenant against contingent fees.

Insert the contract clause set forth in § 7.103–20.

§ 7.402–20 Authorization and consent.

In accordance with the requirements of § 9.102, insert the appropriate contract clause set forth therein

§ 7.402–21 Notice and assistance regarding patent infringement.

In accordance with the requirements of § 9.104, insert the contract clause set forth therein.

§ 7.402–22 Patent rights.

In accordance with the requirements of § 9.107, insert the appropriate contract clause set forth therein with additional or alternate paragraphs as prescribed therein. However, in the case of contracts without fee, the percentage amount specified to be withheld under paragraph (f) of the clause set forth in § 9.107–2, or paragraph (c) and (d) of the clause set forth in § 9.107–3, may be changed from "ten percent (10%)" to "one percent (1%)."

§ 7.402–23 Basic data clause.

In accordance with the requirements of § 9.202, insert the clause set forth in § 9.203–1 with appropriate additional or alternate paragraphs as prescribed by the instructions set forth in §§ 9.203 and 9.204–1.

§ 7.402–24 Military security requirements.

(a) Except in contracts without fee with educational institutions, insert the clause set forth in § 7.104–12, modified in accordance with § 7.104–12: *Provided,* That the reference to "fixed fee" may be deleted in any contract not providing for the payment of a fixed fee: *Provided further,* That the clause may be modified in accordance with § 7.104–12 with respect to contracts outside the United States, its Territories, its possessions, and Puerto Rico, and with respect to additional security safeguards.

(b) The following clause shall be used in all contracts without fee with educational institutions, except that this clause may be appropriately modified for contracts to be performed outside the United States, its Territories, its possessions, and Puerto Rico.

MILITARY SECURITY REQUIREMENTS (FEB. 1959)

(a) The provisions of this clause shall apply to the extent that this contract involves access to information classified "Confidential", including "Confidential—Modified Handling Authorized", or higher.

(b) The Government shall notify the Contractor of the security classification of this contract and the elements thereof, and of any subsequent revisions in such security classification, by the use of a Security Requirements Check List (DD Form 254), or other written notification.

(c) To the extent the Government has indicated as of the date of this contract, or thereafter indicates, security classification under this contract as provided in paragraph (b) above, the Contractor shall safeguard all classified elements of this contract and shall provide and maintain a system of security controls within its own organization in accordance with the requirements of:

(i) The Security Agreement (DD Form 441), including the Department of Defense Industrial Security Manual for Safeguarding Classified Information as in effect on the date of this contract, and any modification to the Security Agreement for the purpose of adapting the Manual to the Contractor's business; and

(ii) Any amendments to said Manual made after the date of this contract, notice of which has been furnished to the Contractor by the Security Office of the Military Department having security cognizance over the facility.

(d) Representatives of the Military Department having security cognizance over the facility and representatives of the contracting Military Department shall have the right to inspect at reasonable intervals the procedures, methods, and facilities, utilized by the Contractor in complying with the security requirements under this contract. Should the Government, through these representatives determine that the Contractor is not complying with the security requirements of this contract the Contractor shall be informed in writing by the Security Office of the cognizant Military Department of the proper action to be taken in order to effect compliance with such requirements.

(e) In the event a change in security requirements, as provided in paragraphs (b) and (c), results (i) in a change in the security classification of this contract or any element thereof from a nonclassified status to a classified status or from a lower classification to a higher classification, or (ii) in more restrictive area controls than previously required, the Contractor shall exert every reasonable effort compatible with its established policies to continue the performance of work under the contract in compliance with such change in security classification or requirements. If, despite such reasonable efforts, the Contractor determines that the continuation of work under this contract is not practicable because of such change in security classification or requirements it shall so notify the Contracting Officer in writing.

(f) After receiving such written notification, the Contracting Officer shall explore the circumstances surrounding the proposed change in security classification or requirements and shall endeavor to work out a mutually satisfactory method whereby the Contractor can continue performance of the work under this contract.

(g) If, upon the expiration of fifteen (15) days after receipt by the Contracting Officer of the notification of the Contractor's stated inability to proceed, (i) the application to this contract of such change in security classification or requirements has not been withdrawn, or (ii) a mutually satisfactory method for continuing performance of work under this contract has not been agreed upon, the Contractor may request the Contracting Officer to terminate the contract in whole or in part. Thereupon, the Contracting Officer shall terminate the contract in whole or in part, as may be appropriate, and such termination shall be deemed a termination under the provisions of the clause of this contract entitled, "Termination for the Convenience of the Government."

(h) The Contractor agrees to insert, in all subcontracts hereunder which involve access to classified information, provisions which shall conform substantially to the language of this clause, including this paragraph (h) but excluding paragraphs (e), (f), and (g) of this clause. In addition, the Contractor may insert in any subcontract, not involving fee or profit, with an educational institution, and any like lower-tier subcontract entered into thereunder may contain, in lieu of paragraphs (e), (f), and (g) of this clause, appropriate provisions extending to such subcontracts relief consistent with that provided for in those paragraphs, on account of changes in security classifications or requirements made under the provisions of this clause subsequent to the date of the subcontract involved. With respect to subcontracts other than those covered by the preceding sentence, "the mutually satisfactory method" provided for in paragraph (f) above may include a provision amending this contract to provide for an equitable adjustment on account of changes in security classifications or requirements made under the provisions of this clause subsequent to the date of the subcontract involved; and the Contractor may insert in any such subcontract, and any like lower-tier subcontract entered into thereunder may contain, in lieu of paragraphs (e), (f), and (g) of this clause, appropriate provisions with respect to such equitable adjustment. Failure of the Contractor and Contracting Officer to agree to any adjustment pursuant to the preceding sentence shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(i) The Contractor also agrees that it shall determine that any subcontractor proposed by it for the performance of a subcontract hereunder which will involve access to classified information in the Contractor's custody has been granted an appropriate facility security clearance which is still in effect, prior to being accorded access to such classified information.

(c) The Contracting Officer or his authorized representative shall prepare and transmit to the contractor and the Government representative having security cognizance over the contract involved a Security Requirements Check List (DD Form 254), or other written notification, in accordance with § 16.811.

§ 7.402–25 Government property.

Insert the contract clause set forth in §§ 13.503 or 13.506, as appropriate.

§ 7.402–26 Insurance—liability to third persons.

(a) Except as provided in paragraph (b) of this section, in accordance with the instructions set forth in § 7.203–22, insert the contract clause set forth therein. If the contractor claims partial immunity from tort liability as a state agency or as a charitable institution (as where work may be performed under the contract in a place or under conditions where the contractor is not immune from tort liability), the following may be added to the clause in § 7.203–22:

(e) Notwithstanding paragraphs (a) and (c) of this clause, (i) the Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for his liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract hereunder; and (ii) the Contractor need not procure or maintain insurance coverage as provided in paragraph (a) of this clause; provided, the Contractor may obtain any insurance coverage he deems necessary subject to approval by _____* as to form, amount, and duration, in which event the Contractor shall be reimbursed (A) for the cost of such insurance and (B) to the extent provided in paragraph (c) above, for liabilities to third persons for which the Contractor has obtained insurance coverage as provided in this paragraph, but for which such coverage is insufficient in amount (OCT. 1960)

In the foregoing clause, insert, in contracts of the Department of the Army and the Department of the Air Force, the words "the Contracting Officer," and insert in contracts of the Department of the Navy, the words "the Department," in the space designated by an asterisk (_____*).

(b) If the contractor claims total immunity from tort liability as a State agency or as a charitable institution, the following clause may be used in lieu of the clause in § 7.203–22:

LIABILITY TO THIRD PERSONS (OCT. 1960)

(a) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for his liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract hereunder.

(b) The Contractor shall give the Government or its representatives immediate notice of any suit or action filed, or prompt notice of any claim made against the Contractor arising out of the performance of this contract, the cost and expense of which may be reimbursable to the Contractor under the provisions of this contract. The Contractor shall furnish immediately to the Government copies of all pertinent papers received by the Contractor. The Contractor shall, if required by the Government, authorize representatives of the Government to settle or defend any such claim and to represent the Contractor in or take charge of any litigation in connection therewith. The Contractor may, at his own expense, be associated with the representatives of the Government in the settlement or defense of any such claim or litigation.

§ 7.402–27 Utilization of labor-surplus area concerns.

Insert the contract clause set forth in § 7.104–20, except in contracts of which the estimated cost does not exceed $5,000 and in contracts with foreign contractors which are to be performed outside the United States, its Territories, its possessions, and Puerto Rico.

§ 7.402–28 Payment for overtime and shift premiums.

In accordance with the requirements of § 12.102 of this chapter, insert the contract clause set forth in § 12.102–3(c) of this chapter.

§ 7.403 Clauses to be used when applicable.

§ 7.403–1 Clauses for contracts involving construction work.

In accordance with the requirements of § 12.403, insert, as appropriate, the clauses entitled:

Davis-Bacon Act.
Eight-Hour Laws—Overtime Compensation.
Apprentices.
Payroll Records and Payrolls.
Copeland ("Anti-Kick-back") Act-Nonrebate of Wages.
Withholding of Funds to Assure Wage Payment.
Subcontracts-Termination.

§ 7.403–2 Filing of patent applications.

In accordance with the requirements of § 9.106, insert the contract clause set forth in § 9.106 or § 9.106–1, as appropriate.

§ 7.403–3 Reporting of royalties.

In accordance with the requirements of § 9.110, insert the contract clause set forth therein.

§ 7.403–4 Excess profit.

In accordance with the requirements of § 7.104–11, insert the appropriate contract clause set forth therein.

§ 7.403–5 Excusable delays.

In all contracts containing the Termination clause set forth in § 8.702 of this chapter, insert the contract clause set forth in § 8.708 of this chapter. In contracts containing the Termination clause set forth in § 8.704 of this chapter, the contract clause set forth in § 8.708 of this chapter may be inserted.

§ 7.403–6 Preference for certain domestic commodities.

In accordance with the requirements of § 6.305, insert the contract clause set forth therein.

§ 7.403–7 Priorities, allocations, and allotments.

In accordance with the requirements of § 1.307–2, insert the contract clause set forth in § 7.104–18.

§ 7.403–8 Soviet-controlled areas.

In accordance with the requirements of § 6.403, insert the contract clause set forth therein.

§ 7.403–9 Negotiated overhead rates.

Where negotiated overhead rates are to be used in contracts with commercial concerns pursuant to Part 3, Subpart G, insert the contract clause set forth in § 3.704–1. Where negotiated overhead rates are to be used in contracts with nonprofit institutions, pursuant to that subpart, insert the contract clause set forth in § 3.704–2.

§ 7.403–10 Notice to the Government of labor disputes.

Insert the clause set forth in § 7.104–4 in all contracts involving the furnishing or production of any item on the Department of Defense Master Urgency List and in any other contract of a class or kind which the Head of the Procuring Activity concerned determines to be appropriate for the use of such a clause.

§ 7.403–11 Gratuities.

Insert the clause set forth in § 7.104–16, except in contracts with foreign governments obligating solely funds other than those contained in Department of Defense appropriation acts.

§ 7.403–12 Limitation on withholding of payments.

(a) Except as provided in (b) below, the following clause shall be inserted in contracts which include more than one clause or Schedule provision authorizing the temporary withholding of amounts otherwise payable to the contractor for supplies delivered or services performed:

LIMITATION ON WITHHOLDING OF PAYMENTS

If more than one clause or Schedule provision of this contract authorizes the temporary withholding of amounts otherwise payable to the Contractor for work performed under this contract, the total of the amounts so withheld at any one time shall not exceed the greatest amount which may be withheld under any one such clause or Schedule provision at that time; *Provided*, That this limitation shall not apply to:

(i) Withholdings pursuant to any clause relating to wages or hours of employees;

(ii) Withholdings not specifically provided for by this contract; and

(iii) The recovery of overpayments.

(b) The clause set forth in (a) above is not required where:

(i) The contracting officer or the procuring activity determines that the withholding limitation in the said clause is incompatible with the purpose of the particular withholding provisions involved; or

(ii) All of the contract clauses or Schedule provisions (in excess of one) which provide for the withholding of payments either (A) are exempt from the limitations in the clause set forth in (a) above under the proviso thereof, or (B) provide that their withholding provisions do not require any additional withholdings where the amounts required to be withheld under them is being withheld under other provisions of the contract.

If it is determined that the withholding limitation in the clause set forth in (a) above is incompatible with the purpose of particular withholding provisions, the said clause may be omitted or modified to make it inapplicable to such withholding provisions.

§ 7.403–13 Defense subcontracting small business program.

In accordance with § 1.707–2(b), insert the contract clause set forth in § 7.104–22.

§ 7.403–14 Changes to make or buy program.

In accordance with the requirements of § 3.902(d) of this subchapter, insert the clause set forth therein.

§ 7.403–15 Quality control system.

In accordance with the instructions in § 7.104–28, insert the contract clause set forth therein.

§ 7.404 Additional clauses.

The following clauses shall be inserted in accordance with Departmental procedures where it is desired to cover the subject matter thereof in such contracts.

§ 7.404–1 Changes.

CHANGES (FEB. 1959)

The Contracting Officer may at any time, by a written order, and without notice to the sureties, if any, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, (ii) method of shipment or packing; (iii) place of inspection, delivery, or acceptance, and (iv) the amount of Government-furnished property. If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of this contract, or otherwise affects any other provisions of this contract, whether changed or not changed by any such order, an equitable adjustment shall be made (i) in the estimated cost or delivery schedule, or both, (ii) in the amount of any fee to be paid to the Contractor, and (iii) in such other provisions of the contract as may be so affected, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within thirty (30) days from the date of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

In the foregoing clause, the period of "thirty (30) days" within which any claim for adjustment must be asserted, may be varied in accordance with Departmental procedures.

§ 7.404–2 Alterations in contract.

The contract clause set forth in § 7.105–1 may be inserted.

§ 7.404–3 Approval of contract.

The contract clause set forth in § 7.105–2 may be inserted.

§ 7.404–4 Bill of materials.

The contract clause set forth in § 7.105–6 may be inserted pursuant to the provisions of said paragraph.

§ 7.404–5 Stop work orders.

The clause set forth in § 7.105–8, if modified as prescribed in § 7.205–7, is authorized for use under the criteria and in accordance with the instructions in § 7.105–8.

§ 7.404–6 Reports of work.

REPORTS OF WORK (JULY 1960)

(a) The contractor shall submit reports making full disclosure of all work done and the results thereof, in the manner, at the times, and to the extent set forth in the Schedule; provided that, unless otherwise specified in the Schedule, the Contractor shall submit such reports in triplicate from time to time as requested and upon completion (or earlier termination) of the work. Except as may be otherwise specified in the Schedule, or unless the Contractor is otherwise instructed, the Contractor shall, upon completion (or earlier termination) of the work, deliver any working drawings and specifications of any prototypes as may have been developed.

(b) If the Contractor becomes unable to complete the contract work and to deliver at the time specified in the Schedule because of technical difficulties, notwithstanding the exercise of good faith and diligent efforts in performance of the work, he shall give the Contracting Officer written notice of the anticipated delays with reasons therefor, not less than forty-five (45) days before the completion date specified in the Schedule or within such time as the Contracting Officer deems sufficient. When notice is so required, the Contracting Officer may, in his discretion, extend the time specified in the Schedule for such period as he deems advisable.

In the above clause, the words "Task Order" or other appropriate designation may be substituted for the word "Schedule," as appropriate. Paragraph (a) may be used without paragraph (b). The last sentence of paragraph (b) may be omitted.

Subpart E—Clauses for Personal Services Contracts

§ 7.500 Scope of subpart.

This subpart sets forth uniform contract clauses for use in personal services contracts referred to in § 7.502.

§ 7.502 Applicability.

As used throughout this subpart, the term "personal services contract" applies only to a contract entered into with an individual, other than an alien scientist, for personal services to be performed by that individual under Government supervision and paid for on a time basis. It does not apply to contracts with firms or organizations.

§ 7.503 Required clauses.

The following clauses shall be inserted in all personal services contracts, except as indicated:

§ 7.503–1 Definitions.

Insert the contract clause set forth in § 7.103–1, omitting paragraph (c).

§ 7.503–2 Payments.

PAYMENTS (JAN. 1958)

Payment for the services performed by the Contractor, as set forth in the Schedule of this contract, shall be made at the rates prescribed, upon the submission by the Contractor of proper invoices or time statements to the office or officer designated herein and at the time provided for herein. In addition to the foregoing the Contractor shall be paid (i) a per diem rate in lieu of subsistence for each day the Contractor is in a travel status away from his home or regular place of employment in accordance with Standardized Government Travel Regulations as authorized in appropriate Travel Orders; and (ii) such other transportation expenses as may be provided for in the Schedule.

§ 7.503–3 Assignment of claims.

ASSIGNMENT OF CLAIMS (JAN. 1953)

No claim arising under this contract shall be transferred or assigned by the Contractor.

§ 7.503–4 Disputes.

Insert the contract clause set forth in § 7.103–12. In accordance with Department procedures, the foregoing clause may be modified to provide for intermediate appeal to the Head of the Procuring Activity concerned. The decision of the Contracting Officer referred to in the above clause shall, if mailed, be sent by certified mail, return receipt requested.

§ 7.503–5 Officials not to benefit.

Insert the contract clause set forth in § 7.103–19, omitting the final clause which begins, "but this provision * * *."

§ 7.503–6 Covenant against contingent fees.

Insert the contract clause set forth in § 7.103–20.

§ 7.503–7 Termination.

TERMINATION (JAN. 1953)

This contract may be terminated by the Government at any time within the period of its duration upon not less than 15 days' written notice by the Contracting Officer to the Contractor. The Contractor, with the written consent of the Contracting Officer, may terminate this contract upon not less than 15 days' written notice to the Contracting Officer, and the consent of the Contracting Officer shall not unreasonably be withheld.

§ 7.503–8 Approval of contract.

APPROVAL OF CONTRACT (JAN. 1953)

This contract shall be subject to the written approval of the Secretary or his duly authorized representative and shall not be binding until so approved.

§ 7.503–9 Patents.

Insert the clause set forth in § 9.108 of this subchapter, which is based on Executive Order 10096, provided, however, that upon written request by the prospective contractor and approval by the head of the procuring activity or his authorized representative, the clause may be modified or omitted, as the case may be, where (a) the period of employment is to be not more than 90 days in any one calendar year, or (b) both the following conditions are present: (1) the period of employment called for in the contract, or in any renewal thereof, is more than 90 days but not more than one year of full-time service, and (2) the prospective contractor is bound by an obligation which existed prior to entering into the proposed contract with the Government and which was not entered into in contemplation thereof, the discharge of which would be inconsistent with the discharge of any obligation arising under Executive Order 10096.

§ 7.504 Clauses to be used when applicable.

§ 7.504–1 Military security requirements.

Insert the clause set forth below in all contracts involving security information which are classified "Top Secret," "Secret," or "Confidential," by a military department, and in any other contract,

the performance of which will require access to classified matter, except that this clause is not required to be used in contracts performed outside the United States, its Territories, its possessions, and Puerto Rico.

MILITARY SECURITY REQUIREMENTS (MAR. 1954)

(a) The provisions of the following paragraphs of this clause shall apply only if and to the extent that this contract involves access to security information classified "Top Secret," "Secret," or "Confidential."

(b) The Contractor (i) shall be responsible for safeguarding all classified security information in accordance with instructions furnished by the Contracting Officer and shall not supply, disclose or otherwise permit access to classified security information to any unauthorized person, (ii) shall not make or permit to be made any reproductions of matter classified "Top Secret" except with the prior written authorization of the Contracting Officer, (iii) shall not make or permit to be made any reproductions of security information classified "Secret" or "Confidential," except as may be essential to performance of the contract, (iv) shall submit to the Contracting Officer, at such times as the Contracting Officer may direct, an accounting of all reproductions of security information classified "Top Secret," "Secret," or "Confidential," and (v) shall not incorporate in any other project any matter which will disclose classified security information except with the prior written authorization of the Contracting Officer.

(c) Except with the prior written consent of the Secretary or his duly authorized representative, the Contractor (i) shall not permit any alien to have access to classified security information, and (ii) shall not permit any individual to have access to security information classified "Top Secret" or "Secret." Access to security information classified "Confidential" will be granted only in accordance with governing regulations of the Department of Defense.

(d) The Contractor agrees to submit immediately to the Contracting Officer a complete confidential report of any information which the Contractor may have concerning existing or threatened espionage, sabotage, or subversive activity.

(e) The Government agrees that when necessary it shall indicate by security classification ("Top Secret," "Secret," or "Confidential"), the degree of importance to the national defense of information to be furnished by the Contractor to the Government or by the Government to the Contractor, and the Government shall give written notice of such security classification to the Contractor and of any subsequent changes thereof. The Contractor is authorized to rely on any letter or other written instrument signed by the Contracting Officer changing the security classification of matter.

(f) Any disagreement concerning a question of fact arising under this clause shall be considered a dispute within the meaning of the clause of this contract entitled "Disputes."

§ 7.504–2 Data and copyrights.

If it is probable that the contractor will prepare and deliver to the Government in the performance of the contract writings, sound recordings, pictorial reproductions, drawings or other graphical representations and works of any similar nature (whether or not copyrighted), insert an appropriate clause in accordance with departmental procedures.

§ 7.505 Additional clause.

The following clause shall be inserted in personal services contracts in accordance with Department procedures when it is desired to cover the subject matter thereof in such contracts.

§ 7.505–1 Alterations in contract.

Insert the contract clause set forth in § 7.105–1.

PART 8—TERMINATION OF CONTRACTS

Sec.
8.000 Scope and applicability of part.

Subpart A—Definitions of Terms

8.101 Definitions.
8.101–1 Amount of claim or settlement.
8.101–2 Common items.
8.101–3 Continued portion of the contract.
8.101–4 Contractor-acquired property.
8.101–5 Contractor inventory.
8.101–6 Disbursing officer.
8.101–7 Effective date of termination.
8.101–8 Government-furnished property.
8.101–9 Material.
8.101–10 Other work.
8.101–11 Partial termination.
8.101–12 Plant clearance period.
8.101–13 Plant equipment.
8.101–14 Prime contract.
8.101–15 Production equipment.
8.101–16 Salvage.
8.101–17 Scrap.
8.101–18 Serviceable or usable property.
8.101–19 Settlement agreement.
8.101–20 Settlement proposal.
8.101–21 Special machinery and equipment.
8.101–22 Special tooling.
8.101–23 Subcontract.
8.101–24 Termination claim.
8.101–25 Termination inventory.
8.101–26 Terminated portion of the contract.

Subpart B—General Principles Applicable to the Settlement of Fixed-Price Type Contracts Terminated for Convenience and to the Settlement of All Terminated Cost-Reimbursement Type Contracts

8.200 Scope of subpart.
8.201 Authority of contracting officers.
8.202 Notice of termination.
8.203 Methods of settlement.
8.204 Duties of prime contractor after receipt of notice of termination.
8.205 Duties of contracting officer after issuance of notice of termination.
8.206 Fraud or other criminal conduct.
8.207 Audit of settlement proposals and of subcontract settlements.
8.208 Settlement of subcontract claims.
8.208–1 Subcontractor's rights.
8.208–2 Prime contractor's rights and obligations.
8.208–3 Settlement procedure.
8.208–4 Authorization for subcontract settlements of $10,000 or less without approval or ratification.
8.208–5 Recognition of judgments and arbitration awards.
8.208–6 Delay in settlement of subcontractor claims.
8.208–7 Government assistance in settlement of subcontracts.
8.208–8 Assignment of rights under subcontracts.
8.209 Settlement agreements.
8.209–1 General.
8.209–2 Excepted items.
8.209–3 Government property.
8.209–4 No-cost settlement.
8.209–5 Partial settlements.
8.209–6 Joint settlement of two or more claims.
8.209–7 Settlement by determination.
8.210 Contracting officer's negotiation memorandum.
8.211 Review and approval of proposed settlements.
8.211–1 Settlement review boards.
8.211–2 Required review and approval.
8.211–3 Scope of review.
8.211–4 Action by board.
8.212 Payment.
8.212–1 Partial payments upon termination.
8.212–2 Final payment.
8.213 Cost principles applicable to the settlement of research and development contracts with educational institutions.

Subpart C—Additional Principles Applicable to the Settlement of Terminated Fixed-Price Type Contracts

8.300 Scope of subpart.
8.301 General.
8.302 Cost principles.
8.303 Allowance for profit.
8.304 Adjustment for loss.
8.305 Deductions.
8.306 Completed end items.
8.307 Settlement proposals.
8.307–1 Submission of settlement proposals.
8.307–2 Bases for settlement proposals.
8.308 Limitation on settlements.

Subpart D—Additional Principles Applicable to the Settlement of Terminated Cost-Reimbursement Type Contracts

8.401 General considerations.
8.402 Election to discontinue vouchers.
8.403 Notice to the General Accounting Office.
8.404 Procedure where contractor continues to submit vouchers.
8.404–1 Submission of settlement proposal.
8.404–2 Submission of cost vouchers.
8.405 Procedure where contractor discontinues use of vouchers.
8.405–1 Submission of settlement proposal.
8.405–2 Interim negotiations.
8.405–3 Information concerning previous cost vouchers.
8.405–4 Notice to General Accounting Office of audit status date.
8.405–5 Exceptions by the General Accounting Office.
8.405–6 Final settlement.
8.406 Partial termination.
8.407 Termination for default.

Subpart E—Disposition of Termination Inventory

Sec.
8.501 General.
8.501–1 Methods of disposal.
8.501–2 General restrictions on contractor's authority.
8.502 Contractor-acquired property; purchase or retention at cost, or return to suppliers.
8.502–1 Purchase or retention at cost.
8.502–2 Return of property to suppliers.
8.502–3 Cost-reimbursement type contracts.
8.503 Inventory schedules.
8.503–1 Submission of inventory schedules.
8.503–2 Separate schedules.
8.503–3 Inventory descriptions.
8.503–4 Inventory schedule certificate.
8.503–5 Common items.
8.503–6 Withdrawals from inventory schedules.
8.503–7 Rejection and correction of inadequate schedules.
8.504 Scrap and salvage.
8.504–1 General.
8.504–2 Scrap warranty.
8.505 Screening of serviceable and usable property.
8.505–1 Scope of screening.
8.505–2 Screening period.
8.505–3 Acquisition by government.
8.506 Government-furnished property.
8.507 Sale or other disposition of termination inventory.
8.507–1 General.
8.507–2 Competitive sales.
8.507–3 Other sales.
8.507–4 Proceeds of sale.
8.507–5 Applicability of antitrust laws.
8.507–6 Foreign contractor inventory.
8.508 Donations.
8.509 Destruction or abandonment.
8.510 Special machinery, tooling and equipment.
8.511 Removal and storage.
8.511–1 Special storage at the expense and risk of the contractor.
8.511–2 Storage at the expense and risk of the Government.
8.512 Review of property disposal.
8.512–1 Property disposal review boards.
8.512–2 Required review.
8.513 Subcontractor termination inventory.
8.513–1 General policy.
8.513–2 Inventory schedules.
8.513–3 Scrap and salvage.
8.513–4 Serviceable and usable property.
8.514 Adjustment prior to final settlement.
8.514–1 Duty of contractors to inform government.
8.514–2 Right of government to review inventory schedules.
8.515 Accounting for termination inventory.

Subpart F—Termination for Default

Sec.
8.600 Scope of subpart.
8.601 General.
8.602 Termination of fixed-price supply contracts for default.
8.602–1 The Government's right to terminate for default.
8.602–2 Effect of termination for default.
8.602–3 Procedure for default.
8.602–4 Procedure in lieu of termination for default.
8.602–5 Memorandum by the contracting officer.
8.602–6 Repurchase against contractor's account.
8.602–7 Other damages.
8.603 Termination of fixed-price construction contracts for default.
8.603–1 Termination of the contractor's right to proceed.
8.603–2 Effect of termination for default.
8.603–3 Procedure for default.
8.603–4 Procedure in lieu of termination for default.
8.603–5 Memorandum by the contracting officer.
8.603–6 Other damages.

Subpart G—Clauses

8.700 Scope of subpart.
8.701 Termination clause for fixed-price contracts.
8.702 Termination clause for cost-reimbursement type contracts.
8.703 Termination clause for fixed-price construction contracts.
8.704 Research and development contracts with educational and other nonprofit institutions.
8.704–1 Termination clause.
8.704–2 Suggested clause for subcontracts.
8.705 Short form termination clauses for fixed-price type contracts.
8.705–1 Supply and service contracts.
8.705–2 Construction contracts.
8.706 Subcontract termination clause.
8.707 Default clause for fixed-price supply contracts.
8.708 Excusable delays clause for cost-reimbursement type supply contracts.
8.709 Default clause for fixed-price construction contracts.
8.710 Default clause for fixed-price research and development contracts.

Subpart H—Forms

8.800 Scope of subpart.
8.801 Notice of termination.
8.801–1 Telegraphic notice of termination.
8.801–2 Letter notice of termination.
8.802 Forms for settlement of fixed-price contracts.
8.802–1 DD Form 540—Settlement Proposal—Inventory Basis.
8.802–2 DD Form 541—Settlement Proposal—Total Cost Basis.
8.802–3 DD Form 881—Settlement Proposal—Short Form.
8.802–4 DD Form 542—Inventory Schedule A—Metals in Mill Product Form.
DD Form 542c—Inventory Schedule A—Continuation Sheet.
8.082–5 DD Form 543—Inventory Schedule B—Raw Materials.
DD Form 543c—Inventory Schedule B—Continuation Sheet.
8.802–6 DD Form 544—Inventory Schedule C—Work in Process.
DD Form 544c—Inventory Schedule C—Continuation Sheet.
8.802–7 DD Form 545—Inventory Schedule D—Dies, Jigs, Fixtures, etc., and Special Tools.
DD Form 545c—Inventory Schedule D—Continuation Sheet.
8.802–8 DD Form 882—Inventory Schedule E–Short Form for Use with DD Form 881 Only.
8.802–9 DD Form 546—Schedule of Accounting Information.
8.802–10 DD Form 548—Application for Partial Payment.
8.803 DD Form 547—Settlement Proposal for Cost-Reimbursement Type Contracts.
8.804 DD Form 547s—Notice of Audit Status Date.
8.805 Scrap Warranty.
8.806 Forms of Settlement Agreement.
8.806–1 Settlement Agreement for Use in Settling Fixed-Price Prime Contracts after Complete Termination.
8.806–2 Settlement Agreement for Use in Settling Fixed-Price Prime Contracts after Partial Termination.
8.806–3 Partial Settlement Agreement, for Use in Settling Fixed-Price Prime Contracts after Complete or Partial Termination where Settlement Pertains Only to Settlements with Subcontractors.
8.806–4 Settlement Agreement for Use in Settling Cost-Reimbursement Type Prime Contracts after Complete Termination where Settlement Includes Costs.
8.806–5 Settlement Agreement for Use in Settling Cost-Reimbursement Type Prime Contracts after Complete Termination where Settlement Is Limited to Fee.
8.806–6 No Cost Settlement Agreement—Partial Termination.
8.806–7 No Cost Settlement Agreement—Complete Termination.
8.807 DD Form 1114—Instructions for Use of Contract Termination Settlement and Inventory Schedule Forms.

(NOTE: A facsimile of each of the forms listed above in §§ 8.802 to 8.807 has been filed with the Federal Register Division; copies of forms may be obtained through the contracting officer in any of the military departments.)

AUTHORITY: §§ 8.000 to 8.807 issued under R. S. 161, sec 2202, 70A Stat. 120; 5 U. S. C. 22, 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314.

§ 8.000 Scope and applicability of part.

(a) This part establishes uniform policies and procedures relating to the complete or partial termination of contracts for the convenience of the Government or for default. It includes uniform contract clauses with respect to termination and excusable delay, and approved termination and settlement forms.

(b) This part applies to contracts which by their terms provide for termination for the convenience of the Government or for the default of the contractor, whether or not the clauses in the contract with respect to termination and excusable delay are those set forth in Subpart G of this part. In the event the clauses actually used in the contract are inconsistent with the provisions of this part, the clauses actually used shall control to the extent of the inconsistency. Contracts which do not contain the applicable clauses may, where it is in the best interest of the Government, be amended by agreement prior to or after termination of the contract, to include or substitute such a clause.

(c) This part also applies to the disposal of contractor inventory arising out of any modification of a cost-reimbursement type contract pursuant to the Changes clause.

(d) When the Head of a Procuring Activity so authorizes, the provisions of this part may be utilized—

(1) In determining any equitable adjustment as a result of modification of any contract other than a cost-reimbursement type contract pursuant to the Changes clause;

(2) In the disposal of any property which has become obsolete or excess for any reason under a contract whenever

the cost of such property is made the basis of a claim by the contractor against the Government; or

(3) In the disposal of contractor inventory generally.

Subpart A—Definitions of Terms

§ 8.101 Definitions.

As used in this part, the following terms have the meaning stated below:

§ 8.101–1 Amount of claim or settlement.

When the action to be taken under this part depends upon the amount of a termination claim or settlement, then, in determining such amount, (a) credits for retention or other disposal of termination inventory allocated to the claim and for advance or partial payments shall not be deducted from the gross claim or settlement; but (b) amounts payable for completed articles or work at the contract price, or for the settlement or discharge of termination claims of subcontractors, shall be deducted.

§ 8.101–2 Common items.

"Common items" means material which is common in nature to both the terminated contract and the contractor's other work.

§ 8.101–3 Continued portion of the contract.

"Continued portion of the contract" means that portion of a partially terminated contract which relates to work or end items not already completed and accepted prior to the effective date of termination and which the contractor must continue to perform.

§ 8.101–4 Contractor-acquired property.

"Contractor-acquired property" is property procured or otherwise provided by the contractor for the performance of a contract, whether or not the Government has title by the terms of the contract, or exercises its contractual right to take title.

§ 8.101–5 Contractor inventory.

"Contractor inventory" means (a) any property acquired by and in the possession of a contractor or subcontractor (including Government-furnished property) under a contract pursuant to the terms of which title is vested in the Government, and in excess of the amounts needed to complete full performance under the entire contract; and (b) any property which the Government is obligated to or has an option to take over under any type of contract as a result either of any changes in the specifications or plans thereunder or of the termination of such contract (or subcontract thereunder), prior to completion of the work, for the convenience or at the option of the Government.

§ 8.101–6 Disbursing officer.

"Disbursing officer" means the officer or agent of the office designated as the paying office under the contract, including as appropriate, Army finance and accounting officers, Air Force accounting and disbursing officers, and Navy regional accounts officers.

§ 8.101–7 Effective date of termination.

"Effective date of termination" means the date upon which the notice of termination first requires the contractor to stop performance, in whole or in part, under the contract. If, however, the termination notice is received subsequent to the date fixed for termination, then the effective date of termination means the date on which the notice is received.

§ 8.101–8 Government-furnished property.

"Government-furnished property" is property in the possession of or acquired directly by the Government, and subsequently delivered or otherwise made available to the contractor.

§ 8.101–9 Material.

"Material" means property which may be incorporated into or attached to an end item to be delivered under a contract or which may be consumed or expended in the performance of a contract. It includes, but is not limited to, raw and processed material, parts, components, assemblies, and small tools and supplies which may be consumed in normal use in the performance of the contract.

§ 8.101–10 Other work.

"Other work" means any current or scheduled work of the contractor, whether Government or commercial, other than work related to the terminated contract.

§ 8.101–11 Partial termination.

"Partial termination" means the termination of a part, but not all, of the work which has not been completed and accepted under a contract.

§ 8.101–12 Plant clearance period.

"Plant clearance period" means a period beginning with the effective date of the termination for convenience and ending, for each particular property classification (such as raw materials, purchased parts, and work in process) at any one plant or location, 90 days after receipt by the contracting officer of acceptable inventory schedules covering all items of that particular property classification in the termination inventory at that plant or location, or ending on such later date as may be agreed to by the contracting officer and the contractor. Final phase of a plant clearance period means that part of a plant clearance period after the receipt of acceptable inventory schedules covering all items of the particular property classification at the plant or location.

§ 8.101–13 Plant equipment.

"Plant equipment" means personal property of a capital nature (consisting of machinery, equipment, furniture, vehicles, machine tools, and accessory and auxiliary items, but excluding special tooling) used or capable of use in the manufacture of supplies or in the performance of services or for any administrative or general plant purpose.

§ 8.101–14 Prime contract.

"Prime contract" means any contract as defined in § 1.201–4 of this chapter entered into by any Department or procuring activity.

§ 8.101–15 Production equipment.

"Production equipment" means those items of plant equipment located within a manufacturing, processing, assembly, or service establishment, and used for cutting, abrading, grinding, shaping, forming, joining, measuring, testing, heating, or treating production materials or work in process.

§ 8.101–16 Salvage.

"Salvage" means property which, because of its worn, damaged, deteriorated, or incomplete condition, or specialized nature, has no reasonable prospect of sale or use as serviceable property without major repairs or alterations but which has some value in excess of its scrap value.

§ 8.101–17 Scrap.

"Scrap" means property that has no reasonable prospect of being sold except for the recovery value of its basic material content.

§ 8.101–18 Serviceable or usable property.

"Serviceable or usable property" means property that has reasonable prospect of sale or use either in its existing form or after minor repairs or alterations.

§ 8.101–19 Settlement agreement.

"Settlement agreement" means a written agreement, in the form of an amendment to the contract, between the contractor and the Government settling all or a severable portion of a settlement proposal.

§ 8.101–20 Settlement proposal.

"Settlement proposal" means a termination claim submitted by a contractor or subcontractor in the form, and supported by the data, required by this part.

§ 8.101–21 Special machinery and equipment.

"Special machinery and equipment" means that part of plant equipment which was acquired or constructed solely for the performance of the terminated contract or the terminated contract and other Government contracts, and as to which the contractor claims loss of useful value.

§ 8.101–22 Special tooling.

"Special tooling" means all jigs, dies, fixtures, molds, patterns, special taps, special gauges, special test equipment, other special equipment and manufacturing aids, and replacements thereof, acquired or manufactured by the contractor for use in the performance of a contract, which are of such a specialized nature that, without substantial modification or alteration, their use is limited to the production of such supplies or parts thereof, or the performance of such services, as are peculiar to the needs of the Government. The term does not include: (a) Items of tooling or equipment acquired by the contractor prior to the contract, or replacements thereof, whether or not altered or adapted for use in the performance of the contract, (b) consumable small tools, or (c) general or special machine tools, or similar capital items.

§ 8.101–23 Subcontract.

"Subcontract" means any contract as defined in § 1.201–4 of this chapter other than a prime contract, entered into by a prime contractor or a subcontractor, calling for supplies or services required for the performance of any one or more prime contracts.

§ 8.101–24 Termination claim.

"Termination claim" means any claim by a contractor or subcontractor, permitted by the terms of a prime contract, for compensation for the termination, in whole or in part, of the prime contract or a subcontract thereunder, and any other claim which this Section authorizes to be asserted and settled in connection with a termination settlement.

§ 8.101–25 Termination inventory.

"Termination inventory" means any items of physical property purchased, supplied, manufactured, furnished, or otherwise acquired for performance of the terminated contract and properly allocable to the terminated portion of the contract. The term does not include any facilities, material, production or other equipment, or special tooling, which are subject to a separate contract or a special contract provision governing the use or disposition thereof. Termination inventory may include contractor-acquired property and Government-furnished property as defined in § 8.101–4 and § 8.101–8.

§ 8.101–26 Terminated portion of the contract.

"Terminated portion of the contract" means that portion of a terminated contract which relates to work or end items not already completed and accepted prior to the effective date of termination and which the contractor is not to continue to perform.

Subpart B—General Principles Applicable to the Settlement of Fixed-Price Type Contracts Terminated for Convenience and to the Settlement of All Terminated Cost-Reimbursement Type Contracts

§ 8.200 Scope of subpart.

This subpart deals with:

(a) The authority of contracting officers to terminate contracts in whole or in part (1) for the convenience of the Government; and (2) in the case of cost-reimbursement type contracts for default;

(b) Duties of the contractor and the contracting officer after issuance of the notice of termination;

(c) General procedures for the settlement of terminated contracts; and

(d) Settlement agreements.

Subpart C sets forth additional principles applicable only to fixed-price type contracts. Subpart D sets forth additional principles applicable only to cost-reimbursement type contracts. Subpart F sets forth the principles applicable to the termination of fixed-price type contracts for default.

§ 8.201 Authority of contracting officers.

The authority of contracting officers to terminate contracts for convenience, and for default in the case of cost-reimbursement type contracts, and to enter into settlement agreements under this subchapter is usually found in the termination clause or other provisions of the contract. Contracts shall be terminated for the convenience of the Government or for default only when such action is in the best interest of the Government, as determined in accordance with Departmental procedures.

§ 8.202 Notice of termination.

Contracts shall be terminated for convenience, or for default in the case of cost-reimbursement type contracts, only by a written notice to the contractor (see 8.801), stating:

(a) That the contract is being terminated for the convenience of the Government (or for default) pursuant to the contract provisions authorizing such termination;

(b) The effective date of termination;

(c) The extent of termination and, if a partial termination, the portion of the contract to be continued; and

(d) Any special instructions.

A copy of the notice of termination shall be sent to any known assignee, guarantor, or surety of the contractor.

§ 8.203 Methods of settlement.

Settlement of terminated cost-reimbursement type contracts and of fixed-price type contracts terminated for convenience may be effected by (a) negotiated agreement, (b) determination by the contracting officer, (c) in the case of cost-reimbursement type contracts, costing-out under vouchers using Standard Form 1034, or (d) a combination of these methods. Every effort shall be made to reach a fair and prompt settlement with the contractor. The negotiated agreement is the most expeditious and most satisfactory method of settling termination claims and shall be used whenever feasible. Settlement by determination shall be used only when a termination claim cannot be settled by agreement.

§ 8.204 Duties of prime contractor after receipt of notice of termination.

The contractor, after receipt of the notice of termination and except as otherwise directed by the contracting officer, must comply with the termination clause of the contract and the notice of termination which generally require, among other things, that the contractor:

(a) Stop work immediately on the terminated portion of the contract and discontinue placing subcontracts thereunder;

(b) Terminate all subcontracts related to the terminated portion of the prime contract;

(c) Immediately advise the contracting officer of any special circumstances precluding the stoppage of work;

(d) If the termination is partial, perform the continued portion of the contract and submit promptly any request for an equitable adjustment of price with respect to the continued portion of the contract, supported by evidence of any increase in the cost thereof;

(e) Take such action as may be necessary, or as the contracting officer may direct, to protect and preserve property in the possession of the contractor in which the Government has or may acquire an interest; and, to the extent directed by the contracting officer, deliver such property to the Government;

(f) Promptly notify the contracting officer in writing of any legal proceedings against the contractor growing out of any subcontract or other commitment related to the terminated portion of the contract;

(g) Settle all outstanding liabilities and all claims arising out of termination of subcontracts, obtaining any approvals or ratifications required by the contracting officer;

(h) Promptly submit its own settlement proposal, supported by appropriate schedules; and

(i) Dispose of any termination inventory, as directed or authorized by the contracting officer.

§ 8.205 Duties of contracting officer after issuance of notice of termination.

(a) In accordance with the termination clause in the contract and with the notice of termination, the contracting officer shall, among other things:

(1) Direct the action required of the prime contractor;

(2) Examine the settlement proposal of the prime contractor and, when appropriate, the settlement proposals of subcontractors;

(3) Promptly negotiate settlement with the contractor and enter into a settlement agreement; and

(4) To the extent that he is unable to negotiate settlement after due and diligent effort, promptly settle the contractor's claim by determination.

(b) To expedite settlement, the contracting officer shall seek assistance from specially qualified personnel (such as negotiating, legal, accounting, inspecting, engineering, and property disposal personnel) to:

(1) Assist the contracting officer in dealings with the contractor;

(2) Render advice on legal and contractual matters;

(3) Conduct accounting reviews and render advice and assistance on accounting matters; and

(4) Perform the following functions with respect to the termination inventory—

(i) Verify its existence;

(ii) Determine qualitative and quantitative allocability;

(iii) make recommendations concerning serviceability and unserviceability.

(iv) Undertake necessary screening and redistribution; and

(v) Assist the contractor in accomplishing other disposition.

(c) An initial conference shall be held with the contractor as promptly as possible to develop a definite program for effecting the settlement. Where appropriate in the judgment of the contracting officer, principal subcontractors should be present. Topics discussed at the conference should include:

(1) General principles relating to the

settlement of any termination claim, including obligations of the contractor under the termination clause of the contract:

(2) Extent of the termination, point at which work is stopped, and status of any plans, drawings, and information which would have been delivered had the contract been completed;

(3) Status of any continuing work;

(4) Obligation of the contractor to terminate subcontracts and general principles to be followed in settlement of subcontractor claims;

(5) Names of subcontractors involved and the respective dates termination notices were issued to them;

(6) Contractor personnel handling, and methods for, review and settlement of subcontractor claims;

(7) Arrangements for transfer of title and delivery to the Government of any materials required by the Government;

(8) General principles and procedures to be followed in the protection, preservation, and disposition of contractor's and subcontractor's termination inventory, including the preparation of termination inventory schedules;

(9) Contractor accounting practices and preparation of DD Form 546 (Schedule of Accounting Information) (§ 8.802–9);

(10) Form in which settlement proposals shall be submitted;

(11) Accounting review of settlement proposals;

(12) Any requirement for interim financing in the nature of partial payments; and

(13) Tentative time schedule for negotiation of the settlement, including submission of settlement proposals, termination inventory schedules, and accounting information schedules by the contractor and subcontractors.

§ 8.206 Fraud or other criminal conduct.

Whenever the contracting officer has reason to suspect fraud or other criminal conduct in connection with the settlement of a terminated contract, he shall discontinue all negotiations with the contractor and shall report the facts in accordance with § 1.111, of this chapter.

§ 8.207 Audit of settlement proposals and of subcontract settlements.

(a) Each settlement proposal of $2,500 or over submitted by a prime contractor shall be referred by the contracting officer to the cognizant audit agency for appropriate examination and recommendation. The contracting officer may, in his discretion, refer for audit settlement proposals of less than $2,500. The contracting officer's referral shall be in writing and shall recommend the scope of the audit, but the auditor may expand the scope of the audit if deemed advisable. The audit agency shall submit a written report and recommendations to the contracting officer, in accordance with Departmental procedures.

(b) Subcontract settlements submitted by the prime contractor to the contracting officer for approval or ratification in accordance with § 8.208 shall be referred to the cognizant audit agency for review and recommendations if (1) the settlement involves $25,000 or more; or (2) the contracting officer considers an audit, in whole or in part, desirable. The audit agency shall submit a written report and recommendations to the contracting officer, in accordance with Departmental procedures.

§ 8.208 Settlement of subcontract claims.

§ 8.208–1 Subcontractor's rights.

A subcontractor has no contractual rights against the Government upon the termination of a prime contract. The rights of a subcontractor are against the prime contractor or intermediate subcontractor with whom it has contracted. Upon termination of a prime contract, the prime contractor and each subcontractor are responsible for the prompt settlement of the termination claims of immediate subcontractors.

§ 8.208–2 Prime contractor's rights and obligations.

Each termination clause provides that, after receipt of a notice of termination and except as otherwise directed by the contracting officer, the prime contractor shall terminate all subcontracts to the extent that they relate to the performance of any work terminated by notice of termination. Prime contractors should therefore, for their own protection, include a termination clause in their subcontracts. A suggested subcontract termination clause is set forth in § 8.706. The failure of a prime contractor to include an appropriate termination clause in any subcontract, or to exercise its rights thereunder, shall not (a) affect the right of the Government to require the termination of the subcontract, or (b) increase the obligation of the Government beyond that which would have arisen if the subcontract had contained an appropriate termination clause. In any such case, the reasonableness of the prime contractor's settlement with the subcontractor should normally be measured by the aggregate amount which would be due under subparagraphs (1), (2), and (3) of paragraph (e) of the suggested subcontract termination clause. Reimbursement in excess of that amount shall be allowed only in unusual cases, and then only when the contracting officer is satisfied that the terms of the subcontract were negotiated in good faith and did not unreasonably increase the rights of the subtractor.

§ 8.208–3 Settlement procedure.

(a) Settlements with subcontractors shall be made in general conformity with the policies and principles relating to settlement of prime contracts as set forth in this subpart and in subpart C or D of this part as applicable. However, the basis and form of the subcontractor's settlement proposal must be acceptable to the prime contractor or the next higher tier subcontractor. Each such settlement shall be supported by accounting and other data sufficient for adequate review by the Government. In no event shall the Government pay to the prime contractor any amount for loss of anticipatory profits or consequential damages resulting from the termination of any subcontract (but see § 8.208–5).

(b) Except as provided in § 8.208–4 (1) all subcontractor termination inventory shall be disposed of and accounted for in accordance with Subpart E of this part, and (2) the contracting officer shall require the prime contractor to submit to him for approval or ratification all termination settlements with subcontractors. In submitting each settlement, the prime contractor shall certify that it has examined the subcontractor's claims included therein, that they are allocable to the terminated portion of the prime contract, and that the settlement is fair and reasonable, was negotiated in good faith, and is not more favorable to the subcontractor than if the Government were not involved. The contractor shall also certify that it has received from all its immediate subcontractors certifications substantially in the form of its own certification. With respect to settlements with more remote subcontractors, the contractor shall certify that it has no information leading it to doubt their reasonableness or their allocability to the terminated portion of the prime contract.

(c) The contracting officer shall promptly examine such subcontract settlement required to be submitted to him (including the basis and form of the proposal upon which the settlement was based) to satisfy himself that the subcontract termination was made necessary by the termination of the prime contract, and that the settlement was arrived at in good faith, is reasonable in amount, and is allocable to the terminated portion of the contract (or if allocable only in part, that the proposed allocation is reasonable). In considering the reasonableness of any subcontract settlement, the contracting officer shall be guided generally by the provisions of this part relating to the settlement of prime contracts, and shall comply with any applicable requirements of §§ 8.207 and 8.211 relating to audit and review. Upon completion of the examination, the contracting officer shall notify the contractor in writing of (1) his approval or ratification, or (2) his reasons for disapproval.

§ 8.208–4 Authorization for subcontract settlements of $10,000 or less without approval or ratification.

(a)(1) The contracting officer may, upon the written request of the prime contractor, authorize it in writing to conclude settlement of $10,000 or less (see § 8.101–1) of its terminated subcontracts, without approval or ratification by the contracting officer, if:

(i) The contracting officer is satisfied with the adequacy of the procedures used by the contractor in settling termination claims (including proposals for retention, sale, or other disposal of termination inventory) of its immediate and lower tier subcontractors.

(ii) Any termination inventory included in determining the amount of the settlement will be disposed of in accordance with § 8.513, except that the dis-

position of such inventory shall not (*a*) be subject to review by the contracting officer under §§ 8.513–1 or 8.513–3, or (*b*) be subject to § 8.513–4; and

(iii) The settlement will be accompanied by a certificate substantially similar to the certificate set forth in the settlement proposal forms in § 8.802: *Provided*, That the contracting officer shall not grant to the contractor any authority hereunder for settlements between $2,500 and $10,000 without the written approval as to that contractor of the Head of the Procuring Activity concerned, or of a deputy or principal assistant responsible for contract matters. Except as provided in subparagraph (3) of this paragraph authority granted to a prime contractor pursuant to this subparagraph (a) (1) by any contracting officer within the Department of Defense shall be applicable to all terminated prime contracts of all procuring activities within the Department of Defense.

(2) Except as provided in subparagraph (3) of this paragraph, the contracting officer without further approval or ratification shall accept, as part of the prime contractor's termination claim, any settlement of terminated lower tier subcontracts concluded by any of its immediate or lower tier subcontractors who, pursuant to subparagraph (1) of this paragraph, have been granted, by any contracting officer within the Department of Defense, authority as prime contractors to settle subcontracts: *Provided*, that the settlement of such lower tier subcontracts is within the limit of such authority.

(3) The provisions of subparagraphs (1) and (2) of this paragraph shall not apply to any contracts under the administration of any contracting officer within the Department of Defense if such contracting officer so notifies the prime contractor concerned. Such notice (i) shall be in writing, (ii) shall be issued only after written approval thereof by the Head of the Procuring Activity concerned or of a deputy or principal assistant responsible for contract matters, and (iii) if subparagraph (2) of this paragraph is involved shall specify any subcontractor affected.

(b) § 8.513 shall apply to any disposal of completed end items allocable to the terminated subcontract, except that completed end items allocable to the terminated subcontract may be disposed of without review by the contracting officer under §§ 8.513–1 or 8.513–3, and without screening under § 8.513–4, if the total amount thereof (at the subcontract price) when added to the amount of the settlement does not exceed the amount authorized under paragraph (a)(1) of this section.

(c) A contracting officer granting the above authorization to a contractor shall be responsible for periodically making a selective review of settlements to determine whether the contractor is making adequate reviews and fair settlements, and whether such authorization shall remain in effect. Whenever the contracting officer determines that the contractor's procedures are not adequate or that improper settlements are being made, he shall revoke the authorization by written notice to the contractor. The revocation shall take effect only from the date of receipt.

(d) Any number of separate settlements of $10,000 or less may be made with a single subcontractor. However, claims which would normally be included in a single settlement proposal, such as those based on a series of separate orders for the same item under one contract, shall be consolidated wherever possible, and shall not be divided in order to bring them within the authorization.

§ 8.208–5 Recognition of judgments and arbitration awards.

(a) In the event a subcontractor obtains a final judgement against a prime contractor, the contracting officer shall, for the purposes of settling the prime contract, treat the amount of the judgment as a cost of settling with the subcontractor, to the extent such judgment is properly allocable to the terminated portion of the prime contract if:

(1) The prime contractor has made reasonable efforts to include in its subcontract the termination clause in § 8.706 or a similar clause excluding payment of anticipatory profits or consequential damages;

(2) The provisions of the subcontract relating to the rights of the parties upon its termination, in whole or in part, are fair and reasonable and do not unreasonably increase the common law rights of the subcontractor;

(3) The contractor has made reasonable efforts to settle the claim of the subcontractor;

(4) The contractor has given prompt notice to the contracting officer of the initiation of the proceedings in which the judgment was rendered and has not refused to give the Government control of the defense of the proceedings; and

(5) The contractor has diligently defended the suit or, if the Government has assumed control of the defense of the proceedings, has rendered such reasonable assistance as has been requested by the Government.

If the foregoing conditions are not all met, the contracting officer may allow the contractor such part of the judgment as he considers a fair amount for settling the termination claim under the subcontract, giving due regard to the policies set forth in this part for settlement of such claims.

(b) Where a contractor and his subcontractor submit a subcontractor termination claim to arbitration under any applicable law or contract provision, the contracting officer shall recognize the amount of the arbitration award as the cost of settling the claim of the subcontractor to the same extent and under the same conditions as specified in paragraph (a) of this section.

§ 8.208–6 Delay in settlement of subcontractor claims.

Where a prime contractor is unable to settle with a subcontractor and such inability is delaying the settlement of the prime contract, the contracting officer may settle with the prime contractor, excepting from the settlement the whole or any part of the claim of such subcontractor and reserving the rights of the Government and of the prime contractor with respect thereto.

§ 8.208–7 Government assistance in settlement of subcontracts.

In unusual cases the contracting officer may determine that it is in the best interests of the Government to offer assistance to the prime contractor in the settlement of a particular subcontract. Such a situation may exist when the prime contractor has made all reasonable efforts to negotiate the settlement without success and the contracting officer believes that with the assistance of the Government a settlement can be reached. Such assistance shall be furnished only with the consent of the prime contractor. In such cases, an agreement may be entered into by the Government, the prime contractor, and a subcontractor, covering the settlement of one or more subcontracts. In any such case, payment to the subcontractor shall be effected through the prime contractor as part of the overall settlement with the latter.

§ 8.208–8 Assignment of rights under subcontracts.

(a) The termination clauses set forth in Subpart G of this part obligate the prime contractor to assign to the Government, in the manner, at the times, and to the extent directed by the contracting officer, all its right, title, and interest under any subcontracts terminated by reason of termination of the prime contract. The contracting officer shall not require such assignment unless he determines that it is in the best interest of the Government.

(b) In giving the Government the right to require the assignment of the prime contractor's interest in terminated subcontracts, the termination clauses set forth in Subpart G of this part also provide that the Government shall have the right, in its discretion, to settle and pay any or all claims arising out of the termination of such subcontracts. This right does not obligate the Government to settle and pay termination claims of subcontractors. As a general rule, the prime contractor is obligated to settle and pay such claims. Where, however, the contracting officer determines that it is in the best interest of the Government to settle and pay directly a subcontractor's termination claim, he shall first obtain approval in accordance with Departmental procedures. An example of a situation in which the best interest of the Government would be served by effecting a direct settlement would be where a subcontractor is the sole source for a product and it appears that a delay by the prime contractor in settlement or payment of the subcontractor's claim will jeopardize the financial position of the subcontractor. Direct settlements with subcontractors are not encouraged.

§ 8.209 Settlement agreements.

§ 8.209–1 General.

When a settlement has been negotiated with respect to the terminated portion of

a contract, and all required reviews have been obtained, the contractor and the contracting officer shall enter into a settlement agreement, substantially in the form set forth in the appropriate subparagraph of § 8.806. The settlement shall cover (a) any setoffs and counterclaims which the Government may have against the contractor and which may be applied against the terminated contract, and (b) all claims of subcontractors, except claims which are specifically excepted from the agreement and reserved for separate settlement.

§ 8.209–2 Excepted items.

Where any rights or claims of the Government or of the contractor are to be excepted from the settlement, the settlement agreement shall specify the nature and extent of the excepted items. However, care shall be taken so that the wording of the exception does not create any new rights in the parties beyond those in existence prior to the execution of the settlement agreement. The separate settlement of excepted items shall be in accordance with the provisions of this Section and shall be set forth in settlement agreements.

§ 8.209–3 Government property.

Before any settlement agreement is executed, the contracting officer shall determine the status of the Government property account for the terminated contract. If the audit of such property required by § 30.2, Appendix B, paragraph 404, or § 30.3, Appendix C, paragraph 215, discloses property for which the contractor cannot account, the settlement agreement shall reserve the rights of the Government with respect to such property, or make an appropriate deduction from the amount otherwise due the contractor.

§ 8.209–4 No-cost settlement.

(a) If no costs have been incurred by the contractor with respect to the terminated portion of the contract or if the contractor is willing to waive the costs incurred by it and if no amounts are due to the Government under the contract, a no-cost settlement agreement shall be executed substantially in the form set forth in § 8.806–6 or § 8.806–7, as applicable.

(b) Under a terminated cost-reimbursement type contract, if the contractor elects to obtain reimbursement of costs by the submission of Standard Form 1034 vouchers (costing-out), the settlement agreement shall cover only the fee, if any.

§ 8.209–5 Partial settlements.

Every effort should be made by the contracting officer to settle in one agreement all rights and liabilities of the parties under the contract except those arising from any continued portion of the contract. Generally, contracting officers shall not attempt to make partial settlements covering particular items of the prime contractor's settlement proposal. However, when a contracting officer cannot promptly effect a complete settlement under the terminated contract, a partial settlement may be entered into: *Provided* (a), The issues on which agreement has been reached are clearly severable from other issues, and (b) the partial settlement will not prejudice the interests of the Government or the contractor in disposing of the unsettled part of the claim.

§ 8.209–6 Joint settlement of two or more claims.

With the consent of the contractor, the contracting officer or officers concerned may negotiate jointly two or more termination claims of the same contractor under different contracts, even though such contracts are with different Military Departments. In such cases, accounting work shall be consolidated to the greatest extent practical. The settlement resulting from such joint negotiation may be evidenced by one settlement agreement covering all contracts involved or by a separate agreement for each contract involved. Where the settlement agreement covers more than one contract, it shall (a) clearly identify the contracts involved; (b) apportion the total amount of the settlement among the several contracts on some reasonable basis; (c) have attached or incorporated therein a schedule showing the apportionment; and (d) be distributed and attached to each contract involved in the same manner as other contract amendments.

§ 8.209–7 Settlement by determination.

(a) *General.* To the extent that the contractor and contracting officer are unable to agree upon the settlement of a terminated contract or if a termination claim is not submitted within the period required by the termination clause in the contract, the contracting officer shall issue a determination of the amount due in accordance with the termination clause in the contract, including any cost principles incorporated therein by reference. The contracting officer shall comply with the provisions of §§ 8.209–1 through 8.209–6 in making any such determination.

(b) *Notice to contractor.* The contracting officer shall give the contractor not less than 15 days' notice by certified mail (return receipt requested) to submit, on or before a stated date, written evidence substantiating the amount claimed to be due.

(c) *Submission of evidence.* (1) The contractor has the burden of establishing by proof satisfactory to the contracting officer the amount claimed.

(2) The contractor may submit such vouchers, verified transcripts of books of account, affidavits, audit reports, and other documents as it may wish. The contracting officer may request the contractor to submit such additional documents and data, and may cause such accounting, investigations, and audits to be made, as he deems appropriate.

(3) The contracting officer may accept photostatic or other copies of documents and records, and shall not require original documents, unless there is a question of authenticity.

(4) If the contractor wishes to confer with the contracting officer, or if the contracting officer wishes additional information from Government personnel or from independent experts, or wishes to consult persons whose affidavits or reports have been submitted, the contracting officer, in his discretion, may hold such conferences as he deems appropriate.

(d) *Determinations.* After reviewing the information submitted or otherwise available to him, the contracting officer shall determine the amount due and shall transmit a copy of his determination to the contractor by certified mail (return receipt requested). The letter of transmittal shall advise the contractor that the determination is a final decision from which an appeal may be taken under the Disputes clause. The determination shall set forth the amount due the contractor and shall be supported by detailed schedules conforming generally to the forms for settlement proposals set forth in Subpart H of this part, and by additional information, schedules, and analyses, as appropriate. An adequate explanation shall be given for each major item of disallowance. The contracting officer need not reconsider (1) any settlement with a subcontractor, (2) any disposition of property, or (3) any other action relating to the terminated portion of the contract, where such settlement, disposition, or other action has been previously ratified or approved by him or another duly authorized contracting officer.

(e) *Preservation of evidence.* The contracting officer shall retain in appropriate files of the contracting agency all written evidence and other data or copies thereof, relied upon by him in making his determination, except that copies of original books of account, need not be made. Books of account together with other original papers and documents, shall be returned to the contractor within a reasonable time.

(f) *Appeals.* The contractor has a right of appeal, under the Disputes clause of the contract, from any settlement by determination, except that the contractor has no such right of appeal where it has failed to submit its settlement proposal within the time provided in the contract and has failed to request extension of such time. The pendency of an appeal shall not affect the authority of the contracting officer to settle the termination claim or any part thereof by a negotiated agreement with the contractor at any time before the appeal is decided.

§ 8.210 Contracting officer's negotiation memorandum.

The contracting officer shall, at the conclusion of the settlement negotiations, prepare a memorandum setting forth the principal elements of the settlement for inclusion in the contract file and for the use of reviewing authorities. If the settlement was negotiated on the basis of individual items, the contracting officer shall specify the factors considered with respect to each item. If the settlement was negotiated on an over-all lump-sum basis, the contracting officer need not evaluate each item or group of items individually, but the total amount of the recommended settlement shall be supported in reasonable detail. The memorandum shall include explana-

tions of matters as to which differences and doubtful questions were settled by agreement, and the factors taken into consideration in connection therewith, and any other matters which, in the opinion of the contracting officer, will assist reviewing authorities in understanding the basis for the settlement.

§ 8.211 Review and approval of proposed settlements.

§ 8.211–1 Settlement review boards.

The Head of each Procuring Activity shall establish Settlement Review Boards to review proposed settlements as required by § 8.211–2 (a). Such boards shall be established in the office of the Head of the Procuring Activity and may also be established in field or regional procurement offices, as appropriate. Each Settlement Review Board should be composed of at least three qualified officers or civilian employees of the Department concerned, who shall be persons with broad business and contracting experience. The membership of each Board should include at least one lawyer, one accountant and, in appropriate cases, an engineer or industrial specialist. No person shall serve as a member of a Settlement Review Board in reviewing a settlement in which he has participated.

§ 8.211–2 Required review and approval.

(a) *When required.* Prior to executing a settlement agreement, or issuing a determination of the amount due under the termination clause of a contract, or approving or ratifying a subcontract settlement, the contracting officer shall submit each such settlement or determination for review and approval by a Settlement Review Board if:

(1) The settlement or determination involves $25,000 or more (see § 8.101–1);

(2) The settlement or determination is limited to adjustment of the fee of a cost-reimbursement contract or subcontract and (i) in the case of a complete termination, the fee, as adjusted, is $25,000 or more; or (ii) in the case of a partial termination, the fee, as adjusted, with respect to the terminated portion of the contract or subcontract is $25,000 or more;

(3) The Head of the Procuring Activity concerned determines that a review is desirable; or

(4) The contracting officer, in his discretion, desires review by the Settlement Review Board.

The review and approval of each settlement or determination in excess of $1,000,000 shall be by a Board at the Head of the Procuring Activity level.

(b) *Submission of information.* The contracting officer shall, in accordance with Departmental procedures, submit to the Settlement Review Board a statement of the settlement, supported by such detailed information as is required for an adequate review. This information should normally include copies of (1) the contractor's or subcontractor's settlement proposal, (2) the audit report, (3) the property disposal report and any required approvals in connection therewith, (4) the contracting officer's memorandum explaining the settlement (§ 8.210), and (5) when appropriate, the opinion of any other Settlement Review Board which has previously reviewed the settlement. The Board may, in its discretion, require the submission of additional information.

§ 8.211–3 Scope of review.

The function of a Settlement Review Board is to determine the overall reasonableness of the proposed settlement agreement or determination from the standpoint of protecting the Government's interest. The Board may vary the scope and intensity of the review according to the size and complexity of the proposed settlement agreement or determination and any other relevant factors. It is not intended that the Board examine in detail every element entering into the proposed settlement agreement or determination, but the Board may inquire into selected elements of the proposed settlement agreement or determination to assure that it has been conducted competently and is based on adequate information.

§ 8.211–4 Action by board.

The Settlement Review Board shall submit to the contracting officer a written opinion with respect to the proposed settlement agreement or determination and any other matter considered by the Board setting forth its approval or disapproval thereof, or other decision thereon. Failure of the Board to submit a written opinion as to any proposed settlement agreement or determination within 30 days after submission to the Board of all the information required pursuant to § 8.211–2(b) shall operate as an approval by the Board.

§ 8.212 Payment.

§ 8.212–1 Partial payments upon termination.

(a) *General.* If the contract authorizes partial payments on termination claims prior to settlement, a fixed-price prime contractor, or a cost-reimbursement prime contractor whose settlement proposal includes costs, may request such partial payments in the form set forth in § 8.802–10 at any time after submission of interim or final settlement proposals. Applications for partial payments shall be processed promptly. Partial payments to a subcontractor shall be made only through the prime contractor.

(b) *Amount of partial payment.* Before approving any partial payment requested by the contractor, the contracting officer shall have made such accounting, engineering, or other specialized reviews as he deems proper of the data required by this part to be submitted in support of the contractor's settlement proposals. If such reviews and the contracting officer's examination of the data indicate that the requested partial payment is proper, the contracting officer may, in his discretion, authorize payments as follows:

(1) An amount up to 100 percent of the contract price, adjusted in accordance with § 8.306 for undelivered acceptable items completed prior to the termination date, or completed thereafter with the approval of the contracting officer, which are included in the contractor's settlement proposals pursuant to § 8.306;

(2) An amount up to 100 percent of the amount of any subcontract settlement effected and paid by the prime contractor: *Provided,* The settlement has been approved or ratified by the contracting officer pursuant to § 8.208–3 (c) or has been authorized pursuant to § 8.208–4;

(3) An amount up to 90 percent of the direct cost of termination inventory, including costs of raw materials, purchased parts, supplies, and direct labor;

(4) A reasonable amount, not to exceed 90 percent, of other allowable costs (including manufacturing and administrative overhead) allocable to the terminated portion of the contract and not included in subparagraph (1), (2), or (3) of this paragraph; and

(5) An amount up to 100 percent of partial payments made to subcontractors in conformance with this subparagraph. No partial payments shall be made on account of profit or fee which may be claimed with respect to the terminated portion of the contract. In exercising his discretion as to the extent to which partial payments shall be made, the contracting officer shall consider the diligence of the contractor in settling with its subcontractors and in preparing its own claim.

(c) *Recognition of assignments.* Where an assignment of claims has been made under the contract, partial payments shall not be made to other than the assignee unless the parties to the assignment consent to the payments.

(d) *Security for partial payments.* To the extent that any partial payment is made with respect to completed end items or for direct or indirect costs of termination inventory, the interests of the Government shall be protected by transfer of title to the Government of the completed end items or termination inventory concerned, or by the creation of a lien in favor of the Government, paramount to all other liens, on such completed end items or termination inventory, or by other means authorized by Departmental procedures.

(e) *Deductions in computing amount of partial payments.* There shall be deducted from the gross amount of any partial payment otherwise payable under § 8.212–1(b):

(1) All unliquidated balances of progress payments and advance payments (including interest thereon) theretofore made to the contractor, which are allocable to the terminated portion of the contract; and

(2) The amounts of all credits arising from the purchase, retention, or sale of property the costs of which are included in the application for partial payment.

(f) *Limitation on total amount: effect of overpayment.* The total amount of all partial payments shall not exceed the amount which will, in the opinion of the contracting officer, become due to the contractor by reason of the termination. If the total of partial payments made to the contractor should exceed the amount finally determined to be due to the contractor on its termination claim, the excess shall be repayable to the Government on demand, together

with interest computed at the rate of 6 percent per annum from the date such excess payment was received by the contractor to the date of repayment: *Provided*, That (1) no interest shall be charged for any such excess payment attributable to a reduction in the contract termination claim by reason of retention or other disposition of termination inventory, until 10 days after the date of such retention or disposition, or such later date as determined by the contracting officer by reason of the circumstances, and (2) no interest shall be charged for overpayment under cost-reimbursement type research and development contracts (without profit or fee to the contractor) if the overpayments are repaid to the Government within 30 days after demand.

(g) *Certification and approval of partial payments.* Partial payments in a specific amount shall be made on the basis of vouchers or invoices certified by the contractor. The certification shall include, in addition to any other provisions ordinarily required to be included in such certificate, the following:

The payment covered by this voucher is a partial payment on account of the Contractor's termination claim under contract No. ------, made pursuant to 32 CFR Part 8.

The invoice or voucher, if proper, shall be approved by the contracting officer by noting thereon the following:

Payment in the amount of $------ approved.

§ 8.212–2 Final payment.

(a) *Negotiated settlement.* Upon execution of a settlement agreement, a voucher or invoice showing the amount agreed upon, less any portion previously paid, shall be prepared and certified in the usual form and presented to the disbursing officer for payment. A copy of the settlement agreement shall be attached to the voucher or invoice.

(b) *Settlement by determination.* In the event of a settlement by determination:

(1) If the contractor has not appealed the determination, a voucher or invoice showing the amount so determined to be due, less any portion previously paid, shall be prepared and certified in the usual form and presented to the disbursing officer for payment; or

(2) If the contractor has appealed the determination, a voucher or invoice showing the amount finally determined on such appeal to be due, less any portion previously paid, shall be prepared and certified in the usual form and presented to the disbursing officer for payment. Pending determination of any appeal, an invoice or voucher pursuant to subparagraph (1) of this paragraph may be presented to the disbursing officer for payment, without prejudice to the rights of either party on the appeal.

(c) *Interest.* No interest shall be paid by the Government on the amount due under a settlement agreement or a settlement by determination.

§ 8.213 Cost principles applicable to the settlement of research and development contracts with educational institutions.

The cost principles and procedures set forth in Subpart C, Part 15, of this chapter shall, subject to the general policies set forth in § 8.301, be a guide for the negotiation of settlements under fixed price or cost-reimbursement type contracts for experimental, developmental or research work with educational institutions, in accordance with § 15.103 and Subpart F, Part 15 of this chapter.

Subpart C—Additional Principles Applicable to the Settlement of Terminated Fixed-Price Type Contracts

§ 8.300 Scope of subpart.

This subpart establishes the guiding principles and policies in connection with arriving at fair compensation for the settlement of terminated fixed-price contracts.

§ 8.301 General.

(a) A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including an allowance for profit thereon which is reasonable under the circumstances. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The application of standards of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.

(b) The primary objective is to negotiate a settlement by agreement. The parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs or profit comprising this amount.

(c) Cost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of record keeping, reporting and accounting, in connection with the settlement of termination claims, shall be kept to the minimum compatible with the reasonable protection of the public interest.

§ 8.302 Cost principles.

The principles set forth in the applicable subpart of Part 15 of this chapter shall be used as a guide for the evaluation of cost information in the negotiation of a termination settlement.

§ 8.303 Allowance for profit.

(a) *General.* Profit shall be allowed only on preparations made and work done by the contractor for the terminated portion of the contract but may not be allowed on the contractor's settlement expenses. Anticipatory profits and consequential damages shall not be allowed (but see § 8.208–5). Any reasonable method may be used to arrive at a fair profit, separately or as a part of the whole settlement.

(b) *Factors to be considered.* In negotiating profit, factors to be considered include:

(1) Extent and difficulty of the work done by the contractor as compared with the total work required by the contract; engineering estimates of the percentage of completion ordinarily should not be required, but if available should be considered;

(2) Engineering work, production scheduling, planning, technical study and supervision, and other necessary services;

(3) Efficiency of the contractor, with particular regard to (i) attainment of quantity and quality production, (ii) reduction of costs, and (iii) economy in the use of materials, facilities, and manpower;

(4) Amount and source of capital employed, and extent of risk assumed, but profit may not be allowed on interest on borrowings allowed as a cost;

(5) Inventive and developmental contributions, and cooperation with the Government and other contractors in supplying technical assistance;

(6) Character of the business, including the source and nature of materials and the complexity of manufacturing techniques;

(7) The rate of profit which the contractor would have earned had the contract been completed;

(8) Character, extent, and difficulty of subcontracting, including selection, placement, and management of subcontracts, settlement of terminated subcontracts, and engineering, technical assistance, and other services rendered but the profit shall not be measured by the amount of the contractor's payments to subcontractors for settlement of their termination claims; and

(9) The rate of profit both parties contemplated at the time the contract was negotiated.

(c) *Profit in settlements by determination.* The formula for determining profit, set forth in subparagraph (e) (2) (C) of the termination clause for fixed-price contracts (§ 8.701) and subparagraph (e) (1) (C) of the clause for fixed-price construction contracts (§ 8.703), is applicable only to a settlement by determination (see § 8.209–7), and shall not be used in establishing the profit allowed in a settlement by negotiation.

§ 8.304 Adjustment for loss.

(a) In the negotiation or determination of any settlement, no profit shall be allowed if it appears that the contractor would have incurred a loss had the entire contract been completed. The amount of loss shall be negotiated or determined and an adjustment in the amount of settlement shall be made as specified in paragraph (b) or (c) of this section. In estimating the cost to complete, consideration shall be given to expected production efficiencies and to other factors affecting the cost to complete.

(b) If the settlement is on an inventory basis, the contractor shall not be paid more than:

(1) The amount negotiated or determined for settlement expenses;

(2) The contract price, as adjusted, for acceptable completed end items (see § 8.306); and

(3) The remainder of the settlement amount otherwise agreed or determined (not excluding the allocable portion of initial costs (see § 15.205–42(c) of this chapter)), reduced by multiplying that remainder by the ratio of (i) the total contract price, to (ii) the total cost incurred prior to termination plus the estimated cost to complete the entire contract;

less all disposal credits and all unliquidated advance and progress payments previously made to the contractor under the contract.

(c) If the settlement is on a total cost basis, the contractor shall not be paid more than:

(1) The amount negotiated or determined for settlement expenses; and

(2) The remainder of the total settlement amount otherwise agreed or determined, reduced by multiplying that remainder by the ratio of (i) the total contract price, to (ii) that remainder plus the estimated cost to complete the entire contract;

less all disposal and other credits, all advance and progress payments, and all other amounts previously paid to the contractor under the contract.

§ 8.305 Deductions.

From the amount payable to the contractor under a settlement, there shall be deducted (a) the agreed price for any part of the termination inventory purchased or retained by the contractor, and the proceeds of sale of any materials sold by it, which have not otherwise been paid or credited to the Government; (b) the fair value, as determined by the contracting officer, of any part of the termination inventory which, prior to transfer of title to the Government or to a buyer pursuant to Subpart E of this part, is destroyed, lost, stolen, or so damaged as to become undeliverable, except for normal spoilage or to the extent the Government has expressly assumed the risk of loss; and (c) such other amounts as appropriate in the particular case.

§ 8.306 Completed end items.

Promptly after the effective date of termination, the contracting officer shall have all undelivered completed end items inspected and accepted if they comply with the prime contract requirements, and shall determine which accepted end items shall be delivered under the contract. The contractor shall be paid for completed end items so accepted and delivered by invoicing them at the contract price in the usual manner and shall not include such end items in its termination claim. Where completed end items, though accepted, are not to be delivered under the contract, the contractor shall include such end items in its settlement proposal at the contract price, appropriately adjusted for any saving of freight or other charges, together with any credits for their purchase, retention, or sale.

§ 8.307 Settlement proposals.

§ 8.307–1 Submission of settlement proposals.

(a) Subject to the provisions of the termination clause in the contract, the contractor shall promptly submit to the contracting officer a settlement proposal setting forth the amount claimed to be due by reason of the termination. The proposal shall be submitted within one year from the effective date of the termination, unless the period has been extended in accordance with the terms of the contract.

(b) The settlement proposal shall cover all elements of the contractor's claim, including settlements with subcontractors. With the consent of the contracting officer, proposals may be filed in successive steps covering separate portions of a claim. Such interim proposals shall include all costs of a particular type, except as the contracting officer may authorize otherwise.

(c) Settlement proposals shall be in the form specified in the appropriate subparagraph of § 8.802. Where none of those forms are adequate for a particular contract, the Head of the Procuring Activity concerned may authorize appropriate modifications. Settlement proposals shall be in reasonable detail supported by adequate accounting data. Actual, standard (appropriately adjusted), or average costs, may be used in preparing settlement proposals: *Provided*, That such costs are determined in accordance with generally recognized accounting principles consistently followed by the contractor. Where actual, standard, or average costs are not reasonably available, estimated costs may be used if the method of arriving at the estimates is approved by the contracting officer. A contractor shall not be required to maintain unduly elaborate cost accounting systems merely because its contracts may subsequently be terminated.

(d) DD Form 831 (§ 8.802–3) may be used when the total claim is less than $2,500, unless otherwise instructed by the contracting officer. Claims which would normally be included in a single settlement proposal, such as those based on a series of separate orders for the same item under one contract, shall be consolidated wherever possible and shall not be divided in such a way as to bring them below $2,500.

§ 8.307–2 Bases for settlement proposals.

(a) *Inventory basis.* Use of the inventory basis for settlement proposals is preferred. Under this basis the contractor shall claim only costs chargeable or allocable to the terminated portion of the contract, and the settlement proposal shall itemize separately:

(1) At purchase or manufacturing cost, each of the following—metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling;

(2) Charges such as engineering costs, initial costs, and general and administrative costs;

(3) Costs of settlements with subcontractors;

(4) Settlement expenses; and

(5) Other proper charges.

An allowance for profit (see § 8.303) or adjustment for loss (see § 8.304 (b)) shall be made to complete the gross termination claim. All unliquidated advance and progress payments, and all disposal and other credits known when the proposal is submitted, shall then be deducted.

(b) *Total cost basis.* (1) When use of the inventory basis is not practicable or will unduly delay settlement, the total cost basis may be used if approved in advance by the contracting officer.

(2) When the total cost basis is used under a complete termination, all costs incurred under the contract up to the effective date of termination shall be itemized and the costs of settlements with subcontractors and applicable settlement expenses shall be added. An allowance for profit (see § 8.303) or adjustment for loss (see § 8.304 (c)) shall be made. The contract price for all end items which have been or are to be delivered and accepted shall be deducted. All unliquidated advance and progress payments, disposal and other credits known when the proposal is submitted, shall also be deducted.

(3) When the total cost basis is used under a partial termination, the settlement proposal shall not be submitted until completion of the continued portion of the contract. The settlement proposal shall be prepared in accordance with subparagraph (2) of this paragraph except that all costs incurred to the date of completion of the continued portion of the contract shall be included.

(c) *Other bases.* Termination claims shall not be submitted on any basis other than paragraph (a) or (b) of this section without the prior approval of the Secretary concerned or his duly designated representative.

§ 8.308 Limitation on settlements.

The total amount payable to the contractor on account of a settlement, whether through negotiation or by determination, before deducting disposal or other credits and exclusive of settlement costs, shall not exceed the contract price less payments otherwise made or to be made under the contract.

Subpart D—Additional Principles Applicable to the Settlement of Terminated Cost-Reimbursement Type Contracts

§ 8.401 General considerations.

The termination clauses for cost-reimbursement type contracts (see §§ 8.702 and 8.704) provide for the settlement of costs and of fee, if any. The provisions of the particular contract governing costs shall determine what costs are allowable.

§ 8.402 Election to discontinue vouchers.

(a) After the effective date of termination, the contractor may elect to discontinue the use of Standard Form 1034 (Public Voucher). Such election shall be made in the manner required by the contracting officer (in the case of the Navy, the Comptroller of the Navy (Contract Audit Division)). Upon such election, the contractor shall not be permitted to resume the use of Standard

Form 1034, and shall submit unvouchered costs on the settlement proposal form prescribed in § 8.803. On the basis of such settlement proposals, partial settlements may be made from time to time as appropriate.

(b) A contractor which continues to use Standard Form 1034 may at any time thereafter elect to discontinue the use of such vouchers. A contractor shall not, however, be permitted to recover costs by the use, during the same period of time, of both Standard Form 1034 and settlement proposals, except as provided in § 8.406.

§ 8.403 Notice to the General Accounting Office.

The contracting officer shall promptly send a copy of the notice of termination to the General Accounting Office, and shall promptly advise that office of any election by the contractor pursuant to § 8.402 to discontinue the use of Standard Form 1034.

§ 8.404 Procedure where contractor continues to submit vouchers.

§ 8.404–1 Submission of settlement proposal.

If the contractor elects to continue to submit reimbursable costs on Standard Form 1034, the contractor shall submit a settlement proposal which shall be limited as to amount to its claim, if any, for a fee. The proposal shall be submitted to the contracting officer within one year from the effective date of termination, unless the period has been extended in accordance with the terms of the contract. The proposal shall be submitted in the form prescribed in § 8.803. The fee to be paid, if any, shall be established in the manner provided by the contract. Percentage of completion of the contract is generally the basis used. Where this basis is used, factors such as the extent and difficulty of the work done by the contractor (including but not limited to planning, scheduling, technical study, engineering work, production and supervision, placing and supervising subcontracts to the extent reasonably required, and work done by the contractor in (a) stopping performance, (b) settling claims of subcontractors, and (c) disposing of termination inventory) shall be compared with the total work required by the contract. The ratio of costs incurred to the total estimated cost of performing the contract is only one factor in computing the percentage of completion of the contract. This percentage may be either greater or less than that indicated by the ratio of costs incurred, depending upon the evaluation by the contracting officer of the above factors and other relevant considerations.

§ 8.404–2 Submission of cost vouchers.

The contractor shall submit on Standard Form 1034 all costs reimbursable under the contract, including (a) its own costs allocable to the terminated portion of the contract, (b) costs of settlements with subcontractors, and (c) applicable settlement expenses. The contractor shall not be reimbursed for the costs of settlements with subcontractors unless the approvals or ratifications required pursuant to the contract have been obtained (see § 8.208).

§ 8.405 Procedure where contractor discontinues use of vouchers.

§ 8.405–1 Submission of settlement proposal.

If the contractor discontinues the use of Standard Form 1034, it shall submit a settlement proposal covering both its costs and its claim, if any, for a fee. The proposal shall be submitted to the contracting officer within one year from the effective date of termination, unless the period has been extended in accordance with the terms of the contract. The proposal shall be submitted in the form prescribed in § 8.803, unless the Head of the Procuring Activity concerned authorizes modification thereof. The proposal shall contain only unvouchered costs and the contractor may not include in its settlement proposal those costs which have been finally disallowed or are the subject of a reclaim voucher.

§ 8.405–2 Interim negotiations.

The contracting officer and the contractor shall proceed immediately to take all action required by the termination clause of the contract and by this part (including negotiation of settlements with fixed-price subcontractors), but no final settlement agreement shall be executed until there has been full compliance with § 8.405–3 through § 8.405–5.

§ 8.405–3 Information concerning previous cost vouchers.

(a) The contracting officer (in the case of the Navy, the Comptroller of the Navy (Contract Audit Division)) shall notify the appropriate disbursing officer in writing of the number of the last Standard Form 1034 cost voucher submitted to him for payment.

(b) Within 10 days from the date of payment of the last Standard Form 1034 voucher or from the date of receipt of the notice referred to in paragraph (a) of this section, whichever is later, the disbursing officer shall prepare and transmit to the contracting officer a list of all Standard Form 1043 vouchers paid under the contract, showing (1) Disbursing Office voucher number, (2) amount of voucher, (3) date of payment, (4) disbursing officer's name, symbol, and address, and (5) total amount of vouchers paid. The contracting officer shall verify the number and amounts of the vouchers listed against the records of the procuring activity, and if any discrepancies exist, shall request the disbursing officer to reconcile them. After reconciliation, the verified list shall be returned to the disbursing officer. (In the case of the Navy, the disbursing officer shall, in lieu of transmitting the list of vouchers to the contracting officer, transmit it to the Comptroller of the Navy (Contract Audit Division), for verification.)

§ 8.405–4 Notice to General Accounting Office of audit status date.

Upon receipt of the verified list of vouchers, the disbursing officer shall immediately transmit a Notice of Audit Status Date (DD Form 547s) by certified mail (return receipt requested) to the Regional Office of the General Accounting Office zone in which the work on the terminated contract was being performed. Such notice fixes as the "Audit Status Date" (a) the day 60 days from the date of the receipt of the notice by the General Accounting Office, or (b) the date of the receipt by the procuring activity of the final General Accounting Office audit status letter, whichever is earlier. The disbursing officer shall send a copy of the notice to the contracting officer (in the case of the Navy, also to the Comptroller of the Navy (Contract Audit Division)), and shall state when the notice was received by the General Accounting Office.

§ 8.405–5 Exceptions by the General Accounting Office.

(a) During the first 30 days after receipt by it of the audit status notice, the General Accounting Office will continue to issue informal inquiries before issuing exceptions; thereafter, and until the audit status date, it will issue exceptions without issuing informal inquiries. Only those exceptions listed in the General Accounting Office final audit status letter will be considered as outstanding at that time; all informal inquiries will either be converted by the General Accounting Office to exceptions at the time of issuance of that letter or be deemed to have been cleared. Upon receipt of replies to exceptions, the General Accounting Office will promptly furnish notice that the reply is satisfactory or will promptly issue a revised exception. No exceptions (other than pro forma exceptions) will be issued after the audit status date.

(b) All replies to exceptions and informal inquiries shall advise the General Accounting Office of the disposition to be made of the particular item in the final settlement and shall contain complete information justifying the payments in question. Replies shall be submitted promptly in accordance with Departmental procedures. After the audit status date, a final attempt shall be made by the contracting officer to clear with the General Accounting Office all outstanding exceptions and reclaim vouchers prior to final settlement.

§ 8.405–6 Final settlement.

(a) The contracting officer may proceed with completion of the settlement and execution of an appropriate settlement agreement at any time after receipt of the final audit status letter. If no such letter has been received on or before the 15th day following the audit status date, the contracting officer may proceed on the basis that there are no outstanding exceptions.

(b) The fee shall be adjusted as provided in § 8.404–1.

(c) The final settlement agreement may include all claims of the Government and of the contractor under the terminated contract, except that no amount may be allowed for any item of cost which is the subject of a General

Accounting Office exception, either cleared by deduction or uncleared, or for any other item of cost of the same nature, unless a reclaim voucher covering such cost has been presented by the contractor and authorized by the General Accounting Office for payment.

(d) The provisions of the contract governing the types of reimbursable costs shall constitute the basis of negotiation; however, if an overall settlement of costs is agreed upon, agreement on each separate element of cost is not necessary. In appropriate cases, differences may be compromised and doubtful questions settled by agreement. An overall settlement shall not, under any circumstances, be made the means of reimbursing contractors for costs which under the provisions of the contract are clearly not allowable.

§ 8.406 Partial termination.

In the event of a partial termination of a cost-reimbursement type contract, the settlement shall be limited to adjustment of the fee, if any, unless the contracting officer determines that:

(a) The terminated portion is clearly severable from the balance of the contract; or

(b) Performance of the contract is virtually complete, or that performance of any continued portion is only on subsidiary items or spare parts, or is otherwise not substantial.

Subject to the foregoing exceptions, all costs under the contract, including those arising out of the partial termination, will continue to be presented in the same manner as prior to the notice of termination.

§ 8.407 Termination for default.

The right to terminate a cost-reimbursement type contract for default is provided for in the Termination clause set forth in § 8.702. In the event of termination, the contractor shall be reimbursed its allowable costs in accordance with the clause, and an appropriate reduction shall be made in the total fee, if any, computed in accordance with the default provisions of the contract (see paragraph (e)(1)(D)(II) of the clause in § 8.702). The costs of preparing the contractor's settlement proposal are not allowable. A cost-reimbursement type contract does not contain any provision for recovery of excess costs of reprocurement after termination for default, but see paragraph (b) of the clause set forth in § 7.203–5 of this chapter with respect to failure of the contractor to replace or correct defective supplies. The procedures set forth in §§ 8.602 and 8.603 shall be used to the extent appropriate in considering the termination for default of a cost-reimbursement type contract. A ten-day notice to the contractor prior to termination for default is required in every case by the Termination clause in § 8.702.

Subpart E—Disposition of Termination Inventory

§ 8.501 General.

§ 8.501–1 Methods of disposal.

Subject to the Government exercising its right under the termination clause in a contract to acquire title to, and require delivery of, any items of termination inventory, the contractor shall dispose of all termination inventory in the manner most favorable to the Government by the following methods, in the order of priority indicated:

(a) Purchase or retention by the prime contractor or subcontractor at cost;

(b) Return to suppliers;

(c) Sale (including purchase or retention at less than cost by the prime contractor or subcontractor); or

(d) Other disposition as hereinafter provided.

§ 8.501–2 General restrictions on contractor's authority.

(a) The following general restrictions are in addition to specific restrictions set forth in this Subpart E.

(b) The authority of a contractor to purchase, retain, or dispose of termination inventory or to authorize or approve a purchase, retention, or disposition by a subcontractor is subject to (1) any applicable Government restrictions on the disposition of property which is either classified by reason of military security or is dangerous to public health, safety or welfare, and (2) any contract provisions regarding the disposition of material subject to a lien.

(c) Contractors shall not sell termination inventory to persons known by them to be officers, enlisted personnel, or civilian employees of the Department of Defense.

(d) The authority of a contractor to approve a sale or a purchase or retention at less than cost, by a subcontractor and the authority of a subcontractor to sell, or to purchase or retain at less than cost, termination inventory with the approval of the next higher-tier contractor does not include (1) a sale by a subcontractor to the next higher-tier contractor or to an affiliate of such contractor or of the subcontractor, or (2) a sale, or a purchase or retention at less than cost, by a subcontractor affiliated with the next higher-tier contractor. Each such excluded sale, purchase, or retention requires the written approval of the contracting officer. A firm shall be considered to be affiliated with another firm if they are under common control or if there is any common interest between them, by reason of stock ownership or otherwise, which is sufficient to create a reasonable doubt that the bargaining between them is completely at arm's length.

§ 8.502 Contractor-acquired property; purchase or retention at cost, or return to suppliers.

§ 8.502–1 Purchase or retention at cost.

Contractors shall be encouraged to purchase or retain contractor-acquired property at cost. No part of the cost of property so purchased or retained shall be included in settlement proposals. In any instance in which a contractor purchases or retains any allocable contractor-acquired property for use in other continuing Government contracts or commercial operations, handling and transportation charges necessitated by the purchase or retention of such property may be included in the contractor's settlement proposal as "other costs"; *Provided*, That such costs are reasonable. Where property purchased or retained is for use on a continuing Government contract and is not in excess of the quantitative requirements for completion of that contract, that property shall be considered properly allocable to the continuing contract if that contract is subsequently terminated, even though its procurement would otherwise constitute undue anticipation of production schedules. If, as a result of the purchase or retention of property from a terminated contract for use on a continuing Government contract, the contractor terminates subcontracts under the continuing Government contract, the charges incurred by reason of the termination of such subcontracts may be included in the termination claim under the terminated contract.

§ 8.502–2 Return of property to suppliers.

Contractors are authorized and shall be encouraged to return allocable quantities of contractor-acquired property to suppliers for full credit less the supplier's normal restocking charge, or 15 percent of cost, whichever is less. Contractors shall not include in their settlement proposals the cost of such property returned to suppliers in accordance with this section. Contractors may include in their settlement proposals as "other costs" the transportation, handling, and restocking charges with respect to the property so returned.

§ 8.502–3 Cost-reimbursement type contracts.

Under cost-reimbursement type contracts, the contractor's right to purchase or retain contractor-acquired property at cost (§ 8.502–1) or return such property to suppliers (§ 8.502–2) shall be subject to the approval of the contracting officer after adjustment of previously reimbursed costs for such property.

§ 8.503 Inventory schedules.

§ 8.503–1 Submission of inventory schedules.

As promptly as possible after receipt of a Notice of Termination, the prime contractor is required to submit inventory schedules to the contracting officer covering all items of termination inventory, including Government-furnished property: *Provided*, That termination inventory purchased or retained at cost, or returned to suppliers, pursuant to § 8.502 shall not be listed. Inventory schedules may be submitted prior to submission of the settlement proposal. Submission shall not be delayed in order to supply complete cost data on items of work in process where such data is not readily available. Partial schedules may be submitted from time to time when they cover substantial portions of a particular property classification in the termination inventory. Each schedule submitted shall be designated by the contractor as "partial" or "final."

§ 8.503–2 Separate schedules.

Separate sets of schedules shall be submitted on the forms prescribed in §§ 8.802–4 through 8.802–8, for contractor-acquired property and for Government-furnished property, and, within each of those categories, for each of the following classifications:

(a) Production equipment;

(b) Serviceable aircraft or aircraft components;

(c) Other serviceable or usable materials; and

(d) Scrap or salvage.

Classification of property by the contractor in the schedules shall be subject to the approval of the contracting officer.

§ 8.503–3 Inventory descriptions.

A commercial description, adequate for disposal and screening purposes, of all items having commercial value shall be included in the inventory schedules. Where any items of termination inventory bear a Government identification number, such number shall be listed on the inventory schedules. In the case of other items, the contractor shall furnish a description sufficient to enable the contracting officer to determine the proper disposition thereof. The contractor shall consult the contracting officer when in doubt as to the extent of description required. The contractor need not itemize material believed to be scrap or salvage if (a) such material is physically segregated in the contractor's plant; and (b) the contractor submits a statement describing the material generally, setting forth its approximate cost, and giving such other information as may be necessary for the contracting officer to determine whether the material is scrap or salvage. If the material is determined by the contracting officer to be scrap or salvage (see § 8.504), the contractor may make a single descriptive entry on an inventory schedule covering such material and indicating its approximate total cost.

§ 8.503–4 Inventory schedule certificate.

The certificate on the inventory schedules prescribed in § 8.802–4 through § 8.802–8 shall be executed by the contractor on each schedule submitted. The certificate, among other things, tenders title to the Government of the property listed therein, unless the Government already has title thereto.

§ 8.503–5 Common items.

Under no circumstances shall the contractor's inventory schedules include any items (except for property delivery of which has been required by the Government and except for Government-furnished property) reasonably usable on other work of the contractor without loss to it. (See § 15.205–42.)

§ 8.503–6 Withdrawals from inventory schedules.

If at any time prior to final disposition any items of contractor-acquired property listed in the contractor's inventory schedules become reasonably usable on other work of the contractor without loss to it and this fact is known to the contractor, the contractor is required to purchase or retain such items at cost in accordance with §§ 8.502–1 or 8.502–3, whichever is applicable, and shall amend its inventory schedules and its settlement proposal accordingly. Upon notification to the contracting officer, the contractor may similarly purchase or retain at cost any other items of property included in its inventory schedules. Withdrawal of Government-furnished property included in inventory schedules is subject to approval by the contracting officer.

§ 8.503–7 Rejection and correction of inadequate schedules.

(a) *General.* Contracting officers shall cause to be verified, to the extent practicable, the physical count and condition of inventories, including Government-furnished property, listed on the contractor's inventory schedules. If any inventory schedule submitted by a contractor is found to be inadequate, the contractor shall be promptly notified and required to correct or supplement the schedule as to the items which are deficient. Inventory schedules shall not be rejected if the information contained therein is adequate for disposal purposes, even if complete cost data on work in process are not available. Rejection of an inventory schedule shall be limited where possible to specific items thereon and shall not necessarily render the entire schedule unacceptable.

(b) ***Effect on plant clearance period.*** (1) Where only individual items on the inventory schedules covering all items of a particular property classification are in need of correction or amplification, the inventory schedules as submitted shall be considered acceptable for purposes of starting the final phase of a plant clearance period (see § 8.101–12). However, where the inadequacy of an inventory schedule requires the return of the entire schedule to the contractor for correction or revision, the final phase of the plant clearance period as to the property classification covered thereby shall not begin until acceptable final schedules covering that property classification have been submitted.

(2) The contracting officer shall advise the contractor of any deficiencies apparent in the inventory schedule within 15 days after receipt of the final schedule, or the schedules shall be deemed acceptable for purposes of starting the final phase of a plant clearance period. However, should substantial errors develop which were not apparent from the inventory schedules previously deemed acceptable, the final phase of a plant clearance period shall not be deemed to have commenced until corrected schedules have been submitted unless the contracting officer determines that no unwarranted delay in disposal operations was occasioned thereby.

§ 8.504 Scrap and salvage.

§ 8.504–1 General.

Promptly after the submission of inventory schedules by the contractor, the contracting officer shall review, or cause to be reviewed, the contractor's treatment of any items of termination inventory as scrap or salvage (see § 8.503–3). The review shall include a careful examination of the inventory schedules and in appropriate cases physical inspection of the property involved. Prior to determining that such items are scrap or salvage, the contracting officer shall obtain such approvals as may be required by Departmental procedures. If the contracting officer determines that any of the materials listed by the contractor as scrap or salvage are serviceable or usable materials, the contractor shall, in accordance with such determination, submit revised inventory schedules (see § 8.503–7). Property determined to be scrap and which, by other Government regulations, is required to be segregated by alloy or otherwise, shall be so segregated by the contractor. Property determined to be scrap or salvage may, with the approval of the contracting officer, be sold or otherwise disposed of by the contractor in accordance with the provisions of §§ 8.505–3, 8.507, or 8.509. In appropriate cases, when approved by the contracting officer, such sales may be consolidated with the contractor's sales of scrap and salvage generated from its other work and, in such cases, the scrap warranty required by § 8.504–2 may be waived in the discretion of the contracting officer.

§ 8.504–2 Scrap warranty.

(a) If any termination inventory is sold as scrap, a scrap warranty, substantially as set forth in § 8.805 shall be obtained.

(b) The scrap warranty may be released on behalf of the Government by the contracting officer if, as consideration for the release, the Government is paid the difference between (1) the price for which the material was sold as scrap and (2) an amount, approved by the contracting officer, not less than that which the material would bring if it were sold at a fair and reasonable price as set forth in § 8.507–2 (a), for purposes other than use as scrap. The release of the scrap warranty shall be given by the Government and the consideration paid to the Government, even though the contract containing the warranty was not made directly with the Government.

(c) In the event of resale of any material subject to a scrap warranty, the seller is required to obtain an appropriate scrap warranty from the purchaser thereof. Upon tender of this warranty to the Government, the seller shall be released by the Government from liability under his own warranty.

§ 8.505 Screening of serviceable and usable property.

§ 8.505–1 Scope of screening.

(a) Subject to (c), (d), (e), and (f) below, serviceable and usable property, other than production equipment, included in the contractor's inventory schedules shall be screened as follows:

(1) Inventories of aircraft and aircraft components shall be screened for possible redistribution within the Departments of the Air Force and Navy;

(2) Items, such as reserved materials, strategic and critical materials, and narcotics, shall be reported for any special screening as required by Departmental procedures; and

(3) Inventories of other items shall be

screened to the extent required by the procuring activity, which may include reporting to the Utilization Division, Armed Forces Supply Support Center.

(b) Production equipment inventories shall be reviewed by the procuring activity for utilization purposes. Items of production equipment in the Federal Supply Classification Codes (FSCC) listed below which are excess to the needs of the procuring activity shall be reported to the Utilization Division, Armed Forces Supply Support Center, Washington 25, D.C. for Department of Defense utilization screening when the acquisition value of the item is $500 or more, and the condition of the item is N3, E3, O3, R2 or better, except as otherwise indicated by asterisks. See §§ 8.802–4 through 8.802–8 for condition codes listed on Inventory Schedules.

PRODUCTION EQUIPMENT

Present Standard Commodity Classification Code	Area title	Federal Supply Classification Code	Area title
3411 through 3419	Metalworking Machinery	3411	Boring Machines.
		3412	Broaching Machines.
		3413	Drilling Machines.
		3414	Gear Cutting and Finishing Machines.
		3415	Grinding Machines.
		3416	Lathes.
		3417	Milling Machines.
		3418	Planers.
		3419	Miscellaneous Machine Tools.
3440 through 3449	Secondary Metal Forming and Cutting Machinery.	3441	Bending and Forming Hydraulic and Pneumatic Presses, Power Driven.
		3442	Mechanical Presses, Power Driven.
		3443	Manual Presses.
		3444	Punching and Shearing Machines.
		3445	Forging Machinery and Hammers.
		3446	Wire and Metal Ribbon Forming Machines.
		3447	Riveting Machines.
		3448	Miscellaneous Secondary Metal Forming and Cutting Machines.
		3449	
3450 through 3459	Welding and Cutting Machinery	3432	Welding, Flame Cutting and Metalizing Equipment and Supplies.
3520	Textile Industries Machinery	3625*	Textile Industries Machinery.
3550	Rubber Working Machinery	3620*	Rubber Working Machinery.
3572	Metal Heat Treating Furnaces and Ovens.	3421	Metal Heat Treating Equipment.
3920 through 3929	Wrapping and Packaging Machinery.	3540*	Wrapping and Packaging Machinery.
3991	Centrifugals, Industrial Types	4330 Pt	Centrifugals.
3992	Separators, Industrial Types	4330 Pt	Separators.
3996	Dust Collection and Air Purification Equipment.	4460**	Air Purification Equipment Includes Electronic Precipitrons Dust Collection Equipment.
5500 through 5590 (*less* 5520, 5528, 5541, 5552, 5553, 5554, 5562, 5564, 5565, 5568, and mobile cranes and derricks).	Industrial Type Conveying Elevating and Materials Handling Equipment (except locomotive cranes, winches, windlasses, capstans and mobile cranes and derricks of all types).	3910* Pt	Conveyors Includes: Aerial Tramways and Cableways, Pneumatic Tube Systems, Stationary Conveyors, Powered and Nonpowered.
		3930*	Warehouse Trucks and Tractors Self Propelled Includes: Tug Jockeys. Fork Lifts. Platform Trucks. Straddle Trucks. Cab. Body. Frame and Structural. Components and Springs.
		3950* Pt	Hoists, Cranes and Derricks Includes: Ore Bridges. Warehouse Cranes. Wharf Cranes. Fixed. Overhead Traveling. Cranes.
5650 through 5659	Physical Properties Testing and Inspection Equipment Industrial Production Type Less X-ray.	6635* Pt	Physical Properties Testing Equipment Includes: Hardness Testers.
6814	Complete Industrial X-ray Equipment.	6635* Pt	Industrial X-ray Machines.

NOTE. Pt—as used in conjunction with the FSCC above indicates that a part of a class is applicable to industrial production equipment.

*Minimum reportable acquisition value—$300.

**Minimum reportable condition—N3, E3, O3.

(c) If the contractor has been directed by the Notice of Termination to deliver any items of termination inventory to the Government no further screening of those items shall be required.

(d) If the total serviceable and usable property, other than production equipment, included in the contractor's inventory schedules has an original cost of $2,500 or less, such property need not be screened within the procuring activity unless the contracting officer determines that screening is desirable.

(e) Line items included in the contractor's inventory, having an original cost of $300 or less, need not be screened if such items are listed by the contractor on a separate schedule or schedules unless the contracting officer determines that screening is desirable. The term "line item" means all substantially similar articles under any one contract at any one location and which should be listed as a single entry in an inventory schedule.

(f) Termination inventory to which § 8.208–4 is applicable does not require screening.

§ 8.505–2 Screening period.

Production equipment, and other property voluntarily reported by the procuring activity to the Utilization Division, Armed Forces Supply Support Center, in accordance with Departmental procedures, shall be screened within the Department of Defense for a period not to exceed 30 calendar days after the issue date of the Excess Listing covering that property prepared by the Utilization Division. Upon expiration of the screening period the contracting officer shall notify the contractor promptly that the listed inventory, except that portion for which the contracting officer has received instructions from the Utilization Division, may be sold or otherwise disposed of as hereinafter set forth.

§ 8.505–3 Acquisition by Government.

If any item of serviceable or usable property is desired by any activity of the Department of Defense, or other agency of the Government, for stock, diversion to other contracts, or other purposes, the contractor shall deliver such property as directed by the contracting officer. The order of priority of such acquisition shall be: the procuring activity, other activities of the Department of Defense, and other Government agencies.

§ 8.506 Government-furnished property.

Government-furnished property included in termination inventory, return of which has not been required by the Government, may be disposed of in the same manner as other termination inventory after screening in accordance with the requirements of § 8.505. The contracting officer is required to approve all such dispositions and may specify methods for preparing and routing inventory schedules covering such property.

§ 8.507 Sale or other disposition of termination inventory.

§ 8.507–1 General.

Under the standard termination clauses, the contractor is required to use its best efforts to sell termination inventory, in the manner, at the times, to the extent, and at the prices directed or authorized by the contracting officer, except that the contractor (a) is not required to extend credit to any purchaser, and (b) may purchase or retain at less than cost any items of termination inventory not retained by it at cost. Any property which is included in the contractor's inventory schedules, which has not been acquired by the Government under § 8.505–3, may be purchased or retained at less than cost by the contractor or sold by the contractor to a third party as provided in § 8.507–2 or § 8.507–3 at any time after notification by the contracting officer that screening has been accomplished or will not be required. Any such purchase, retention

or sale shall be subject to the approval of the contracting officer, as part of or prior to the final settlement (see § 8.512 as to review by Property Disposal Review Boards).

§ 8.507–2 Competitive sales.

(a) Except as provided in § 8.507–3, termination inventory shall be offered for sale on a competitive basis. Generally, 3 bids shall be obtained, one of which may be submitted by the contractor. However, solicitations shall not be restricted to three bids, unless the circumstances clearly justify such a restriction. The property shall be sold to that responsible bidder whose bid is most advantageous to the Government, price and other factors considered, or purchased or retained by the contractor if his bid is most advantageous to the Government; provided, that the price shall be fair and reasonable in the light of reasonable knowledge or test of the market, due regard being had for current prices for any raw materials or products for which quotations are published, and to the circumstances, nature, condition, quantity, and location of property. Any bid by the contractor shall be submitted in the same manner as and concurrently with other bids. The contractor shall not be entitled to preference in any sale.

(b) Bids shall be solicited sufficiently in advance of the opening of bids to allow bidders an adequate opportunity to prepare and submit their bids. The contracting officer shall furnish the contractor from available records and bidders lists the names of prospective purchasers. Bids shall be solicited from the original suppliers and those prospective bidders designated by the contracting officer. Bids shall be solicited by any one of the methods set forth below; provided, that when deemed necessary by the contractor to assure full and free competition, more than one method may be used; and provided further that where the original acquisition cost of serviceable material available for sale at any one time and location is $25,000 or more, in addition to any other method of solicitation used, the sale shall also be advertised in a newspaper of general circulation as provided in subparagraph (4) of this paragraph.

(1) A notice of the proposed sale may be mailed or delivered to all prospective bidders; if this method is used, the bidders list shall include all responsible prospective purchasers known to the contractor and located in the general area in which the property is located;

(2) A notice of the proposed sale may be displayed at appropriate public places;

(3) A notice of the proposed sale may be published in appropriate trade journals or magazines;

(4) A notice of the proposed sale may be published in a newspaper of general circulation in the locality in which the property is located; or

(5) Where the amount or value of the property is not large enough to warrant preparation of a formal notice of the proposed sale, or other special circumstances are present, invitations to bid may, with the contracting officer's approval, be issued orally, by telephone, or by other informal media, so long as the element of competition is maintained, and each such sale is fully documented.

(c) Any notice of a proposed sale under paragraph (b) of this section shall indicate in general terms the types of material for sale, shall give the date on or after which such material will be available for sale, and shall reserve the right to reject any or all bids submitted. So far as feasible, lots shall be offered in such reasonable quantities as to permit all bidders, small as well as large, to compete on equal terms.

§ 8.507–3 Other sales.

(a) Sales, or purchases or retentions at less than cost by the contractor, may, if the Government's interests are adequately protected, be authorized by the contracting officer without competitive bids when essential in the interest of making a fair and prompt settlement (including the expeditious clearance of the contractor's plant).

(b) After such screening as may be required by Departmental procedures, scientific equipment allocated to terminated research and development contracts with educational institutions may be sold to or retained by the contractor for use in educational or research pursuits without obtaining competitive bids. Prices under which such equipment is transferred shall be negotiated between the contractor and the contracting officer.

(c) Sales, purchases, and retentions under paragraph (a) or (b) of this section shall be at prices which are fair and reasonable, and not less than the proceeds that could reasonably be expected to be obtained if the property were offered for competitive sale.

§ 8.507–4 Proceeds of sale.

Unless otherwise provided in the contract, the proceeds of any sale, purchase or retention shall be credited to the Government as part of the settlement agreement, or otherwise credited to the price or cost of the work covered by the contract, or paid in such manner as the contracting officer may direct.

§ 8.507–5 Applicability of antitrust laws.

Whenever any termination inventory which has or may cost the Government $3,000,000 or more (or any patents, processes, techniques, or inventions, irrespective of cost) is to be sold or otherwise disposed of to private interests, the Department concerned shall promptly notify the Attorney General and the Administrator of General Services of the proposed disposal and the probable terms or conditions thereof; and shall await advice from the Attorney General as to whether, so far as he can determine, the proposed disposition would tend to create or maintain a situation inconsistent with the antitrust laws. If the Attorney General advises that the proposed disposition would tend to create or maintain a situation inconsistent with the antitrust laws, such disposition will not be made.

§ 8.507–6 Foreign contractor inventory.

(a) To prevent diversion, transshipment or reexport of contractor inventory located in foreign countries to Sino-Soviet bloc countries and the use of such inventory adversely to the interests of the United States, the sale or other disposition of such inventory shall be made in accordance with property disposal regulations in oversea commands including security trade control regulations over foreign excess sales and regulations dealing with integrity and reliability checks. Such regulations apply to the sale of contractor inventory located in foreign countries except (1) sales to friendly foreign governments and (2) inventory located in Canada.

(b) Sales contracts or other documents for passing title to foreign contractor inventory shall include a special warranty appropriately providing that (1) the property will be used in the country in which sold or will be exported only for use and to a destination acceptable to the United States, and (2) the buyer will notify in writing subsequent purchasers or receivers of the property of export destination restrictions.

(c) Before authorizing or approving sales or other disposition of foreign contractor inventory, contracting officers shall communicate with the United States diplomatic mission in the country concerned to initiate integrity and reliability checks and to obtain the necessary suggestions, recommendations, and approvals relative to the disposition and use of foreign contractor inventory.

§ 8.508 Donations.

(a) Termination inventory which is to be sold or otherwise disposed of in accordance with § 8.507 may be donated for educational public health, or civil defense purposes, including research, upon allocation by the Department of Health, Education, and Welfare, subject to approval by the General Services Administration, as authorized by the Federal Property and Administrative Services Act of 1949, as amended. To assist the Department of Health, Education, and Welfare in locating property which is available for donation, each Military Department shall furnish that Department with a directory of activities where donable property files are maintained and may be examined.

(b) Schedules of termination inventory available for donation shall be maintained in a donable property file for a period of 15 days from the date of the decision to dispose of the property in accordance with § 8.507. Within that time the Department of Health, Education, and Welfare has the responsibility (1) to notify the contracting officer of the items selected for donation and (2) to initiate a request to the appropriate General Services Administration regional office for approval of the donation. Disposition of the property selected shall be postponed pending action by the General Services Administration; otherwise, the property shall be disposed of in accordance with § 8.507. Notification to the contracting officer by the General Services Administration of the action on the request shall constitute authority for the contracting officer to hold the property for a period not to exceed 40 days from the date of the notification required by subparagraph (1) of this

paragraph or to take such action as the General Services Administration may direct. If shipping instructions are not received for the property within the 40-day period, together with provision for payment of costs of care, handling, and transportation, incurred incident to donation, the contracting officer shall dispose of the property in accordance with § 8.507.

(c) Property required for use by the Department of Defense may be withdrawn from the items available for donation at any time prior to shipment or delivery to the donee.

§ 8.509 Destruction or abandonment.

(a) Termination inventory which is Government-furnished property or contractor-acquired property and which is not otherwise disposed of under this part, may, in accordance with General Services Administration and Departmental regulations, be destroyed or abandoned: *Provided,* That the contracting officer has determined that it has no commercial value and no value to the Government, or that the estimated cost of its care and handling is greater than the probable sale price, or that because of its nature it constitutes a danger to public health, safety, or welfare. Any such determination shall be subject to review in accordance with § 8.512.

(b) Termination inventory which has been classified by reason of military security, and which is not required for the Government's needs, shall, unless such classification is removed or changed by proper authority, be disposed of in accordance with applicable security regulations.

(c) No termination inventory shall be abandoned on the contractor's premises without the contractor's consent.

§ 8.510 Special machinery, tooling and equipment.

Except as otherwise provided in the contract, if the settlement is to include any item of cost on account of special machinery and equipment, or special tooling, the contracting officer shall take appropriate steps to protect the Government's interest by:

(a) Requiring transfer of title to such property to the Government;

(b) Requiring the inclusion of such property in the contractor's inventory schedules, to be treated in the same manner as termination inventory; or

(c) In the event of purchase or retention by the contractor, making an equitable adjustment of the costs to be included in the settlement for such property, which adjustment shall take into account the rate of amortization thereon, the possible use thereof on other work of the contractor, the ultimate disposal value thereof, and any rights to be retained by the Government.

§ 8.511 Removal and storage.

§ 8.511–1 Special storage at the expense and risk of the contractor.

The contractor may, at any time during the plant clearance period, upon written notice to the contracting officer, store any items of termination inventory, not previously disposed of, in a warehouse or other storage location, on or off its own premises, unless otherwise directed by the contracting officer within 10 days of the receipt by the contracting officer of such notice. Such storage shall in no way modify the responsibility of the contractor with respect to such property. The expense of such storage, including any removal incident thereto, shall be borne by the contractor, unless the contracting officer determines that such removal or storage is for the convenience of the Government.

§ 8.511–2 Storage at the expense and risk of the Government.

At any time after expiration of the plant clearance period, the contractor may submit to the contracting officer, a list certified as to quantity and quality, of any items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the contracting officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than 15 days thereafter, the Government shall accept title to such items and remove them or enter into a written storage agreement covering the same: *Provided,* That the list submitted shall be subject to verification by the contracting officer upon removal of the items (or if the items are stored, within 45 days from the date of submission of the list). Any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

§ 8.512 Review of property disposal.

§ 8.512–1 Property disposal review boards.

The head of each procuring activity shall establish one or more Property Disposal Review Boards. Each such Board shall be composed of at least three qualified officers or civilian employees. No person shall serve as a member of a Property Disposal Review Board in reviewing any property action in which he has participated.

§ 8.512–2 Required review.

The following property disposal matters shall be reviewed by a Property Disposal Review Board which shall sumit its recommendations to the contracting officer prior to approval or ratification by the contracting officer:

(a) A determination that material is scrap or salvage, if the original acquisition cost of the material is $25,000 or more;

(b) A release from a scrap warranty, if the original acquisition cost of the material is $10,000 or more;

(c) Any sales, purchases or retentions at less than cost made without competitive bids (see § 8.507–3) where the original acquisition cost of the materials involved exceeds $25,000;

(d) A determination to destroy or abandon material (see § 8.509) if the original acquisition cost of the material exceeds $1,000;

(e) Any property disposal matter when requested by the contracting officer; and

(f) Any property disposal matter when required by Departmental procedures.

§ 8.513 Subcontractor termination inventory.

§ 8.513–1 General policy.

(a) The prime contractor and each subcontractor are primarily responsible for the disposition of the termination inventory of their respective next lower-tier subcontractors, but all such disposals shall be subject to review by the contracting officer as provided in § 8.208–3 (c) (but see § 8.208–4). The policies and provisions set forth in §§ 8.501, 8.502, 8.506, 8.508, 8.509 and 8.512, shall be applicable in the case of subcontractors. Any rights which the prime contractor has or acquires in the termination inventory of its first-tier or lower-tier subcontractors shall, to the extent directed by the contracting officer, be exercised for the benefit of the Government, in accordance with the provisions of the contract between the Government and the prime contractor.

(b) Subcontractors in all tiers will prepare inventory schedules in accordance with the requirements of this part. Normally disposition instructions for termination inventory, except serviceable and usable property, will be furnished by the next higher-tier subcontractor or the prime contractor, as the case may be. Each subcontractor may submit its next lower-tier subcontractors' inventory schedules of serviceable and usable property directly to the contracting officer for review and disposition instructions, unless otherwise directed by the contracting officer. In the interest of expediting disposition of termination inventory, the cognizant contracting officer will permit such direct submission, unless he determines that the submission of inventory schedules through all intermediate tiers of subcontractors is necessary in the best interest of the Government. When such a determination is made, it must be in writing and a copy submitted to the Head of the Procuring Activity concerned for review.

§ 8.513–2 Inventory schedules.

The prime contractor and each higher-tier subcontractor shall obtain adequate information concerning the termination inventory for which its subcontractors claim reimbursement. For this purpose, the forms of inventory schedules set forth in §§ 8.802–4 through 8.802–8 may be used, but their use is not required if substantially equivalent information is obtained, as called for by § 8.503. In any event, full information on the condition and usability of such inventory shall be furnished, and certificates similar to those set forth in such schedules shall be obtained from the subcontractor.

§ 8.513–3 Scrap and salvage.

The prime contractor and each higher-tier subcontractor shall review any recomendations of their respective subcontractors concerning scrap and salvage. If the prime contractor or the higher-tier subcontractor determines that any of the materials are serviceable and

usable materials, it shall require the subcontractor to submit revised inventory data in accordance with such determination. The Government shall not be bound by any determination that material is scrap or salvage unless the determination, and any sale of the material as scrap or salvage, have the prior approval of the contracting officer. A scrap warranty running to the Government shall be obtained wherever such material is sold as scrap.

§ 8.513–4 Serviceable and usable property.

Subcontractor termination inventory, which is not purchased or retained at cost, and which is determined to be serviceable and usable property shall be disposed of by:

(a) Submission for screening and possible redistribution within the Government pursuant to § 8.505; and

(b) Sales to third parties (including purchases or retentions at less than cost by the subcontractor, a higher-tier subcontractor, or the prime contractor) made in general conformity with § 8.507.

§ 8.514 Adjustment prior to final settlement.

§ 8.514–1 Duty of contractors to inform Government.

By the terms of the Inventory Schedule Certificate set forth in Inventory Schedules A, B, C, D, and E (see § 8.802–4 through 8.802–8) the contractor or subcontractor is required to inform the Government of any substantial change in the status of its termination inventory arising between the date of submission of its termination inventory schedules and final disposition of such inventory.

§ 8.514–2 Right of government to review inventory schedules.

(a) Regardless of any disposition of termination inventory pursuant to this subpart, the Government shall continue to have the right, prior to final settlement, to require additional information concerning such inventory, to contest its allocability to the terminated portion of the contract, or to exclude such inventory from the settlement on any proper grounds.

(b) If, prior to final settlement, the Government determines that any portion of the termination inventory is not allocable to the terminated contract or should be excluded from the settlement on any other grounds, the cost thereof, and any credits related thereto, shall be excluded from the settlement. If the contractor has actually paid to the Government the proceeds realized from the disposition of such inventory, the Government shall repay such proceeds to the contractor. If such inventory has been delivered to the Government, normally it should be returned to the contractor at the contractor's expense and risk.

§ 8.515 Accounting for termination inventory.

(a) Prior to final settlement with the prime contractor, all termination inventory of the prime contractor and its subcontractors must be accounted for as follows:

(1) By purchase or retention at cost by the contractor or subcontractor, or by return to suppliers, and omission or withdrawal of such inventory from the contractor's inventory schedules (see § 8.502);

(2) By transfer to the Government (see § 8.505–3);

(3) By sale (including purchase or retention at less than cost by the contractor or subcontractor) and application of the proceeds or agreed value in reduction of the contractor's claim, or otherwise to the credit of the Government (see § 8.507);

(4) By destruction or abandonment (see § 8.509);

(5) By donation (see § 8.508); or

(6) By other disposition in accordance with the terms of the contract and of this part.

(b) In the event that any termination inventory not disposed of is lost, destroyed, damaged, or for any reason cannot be delivered by the contractor at the time of settlement of its termination claim, such termination inventory, unless the Government has expressly assumed the risk involved, or unless the contract provides otherwise, shall be accounted for as inventory purchased or retained by the Contractor, and the fair value of the inventory, as determined by the contracting officer, shall be deducted from the termination claim.

Subpart F—Termination for Default

§ 8.600 Scope of subpart.

This subpart sets forth policies and procedures for the utilization and application of the Default clause set forth in § 8.707 for fixed-price supply contracts, and the "Termination for Default—Damages for Delay—Time Extensions" clause set forth in § 8.709 for fixed-price construction contracts. (For cost-reimbursement type contracts, see § 8.407.)

§ 8.601 General.

(a) Termination for default is generally the exercise of a contractual right of the Government to terminate the contract in whole or in part by reason of the contractor's failure, actual or anticipatory, to perform its obligations under the contract.

(b) If the contractor can establish that its failure to perform arose out of causes beyond its control and without its fault or negligence, the contract clauses in §§ 8.707 and 8.709 provide that a termination for default shall be deemed to have been a termination for the convenience of the Government, and the rights and obligations of the parties shall be governed accordingly.

(c) The Government may also in appropriate cases exercise termination or cancellation rights in addition to those set forth in the contract clauses (see for example, paragraph (f) of the Default clause in § 8.707).

§ 8.602 Termination of fixed-price supply contracts for default.

§ 8.602–1 The Government's right to terminate for default.

Under contracts containing the Default clause in § 8.707 the Government has the right, subject to the notice requirements of the clause, to terminate the whole or any part of the contract for default if the contractor (a) fails to make delivery of the supplies or to perform the services within the time specified in the contract, (b) fails to perform any other provision of the contract, or (c) fails to make progress so as to endanger performance of the contract.

§ 8.602–2 Effect of termination for default.

Under a termination for default the Government is not liable for the contractor's costs on undelivered work, and is entitled to the repayment of any advance payments and of any progress payments applicable to such work. The Government may elect to take all or any part of the completed supplies and manufacturing materials (see paragraph (d) of the clause set forth in § 8.707). The Government shall pay to the contractor the contract price for such completed supplies delivered and accepted, and the amount agreed upon by the contractor and the contracting officer for such manufacturing materials delivered and accepted and for the protection and preservation of such property. The contractor shall be liable to the Government for any excess costs for supplies and services procured similar to those terminated (see § 8.602–6), and for any other damages, whether or not repurchase is effected (see § 8.602–7).

§ 8.602–3 Procedure for default.

(a) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The provisions of the contract, and applicable laws and regulations;

(2) The specific failure of the contractor and, unless time does not permit, the excuses, if any, for such failure;

(3) The availability of the supplies or services from other sources;

(4) The urgency of the need for the supplies or services and the period of time which would be required to obtain the supplies or services from other sources as compared with the time in which delivery could be obtained from the delinquent contractor;

(5) The degree of essentiality of the contractor in the Government procurement program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts;

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments; and

(7) Any other pertinent facts and circumstances.

(b) If the foregoing consideration indicates that termination for default is appropriate, the contracting officer should, if practicable, notify the contractor by letter of the possibility of such termination. This letter shall call the contractor's attention to its contractual liabilities in the event the contract is terminated for default and request an explanation of the contractor's failure to perform the contract. The letter may further state that failure of the con-

tractor to present such explanation may be taken as an admission that no valid explanation exists. When appropriate, the letter may invite the contractor to discuss the matter at a conference.

(c) If, after compliance with the foregoing procedures, the contracting officer determines that termination for default is proper, he shall, where the termination is predicated upon the contractor's failure to make timely deliveries, issue a notice of termination at once. If the termination is predicated upon any other failure of the contractor, the contractor shall be given written notice specifying such failure and providing a period of 10 days (or such longer period as the contracting officer may authorize) in which to cure such failure. Where appropriate, this notice may be made a part of the letter described in paragraph (b) of this section. Upon expiration of the 10 days (or longer period), the contracting officer may issue a notice of termination for default unless he determines that the failure to perform has been cured.

(d) The notice of termination for default shall:

(1) Set forth the contract number and date;

(2) Describe the acts or omissions constituting the default;

(3) State that the contractor's right to proceed further with performance of the contract (or a specified portion of the contract) is terminated;

(4) State that the supplies or services terminated may be procured against the contractor's account, and that the contractor will be held liable for any excess costs;

(5) State that the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and

(6) State that the notice constitutes a decision that the contractor is in default as specified, and that the contractor has the right to appeal as specified in the Disputes clause.

If the contracting officer has investigated the contractor's excuses for the failure to perform, the notice of termination shall also state that it constitutes a decision that the failure to perform was not due to causes beyond the control and without the fault or negligence of the contractor, and that the contractor has the right to appeal as specified in the Disputes clause.

(e) The same distribution shall be made of the termination notice as was made of the contract. In addition, a copy shall be furnished to the disbursing officer who shall be advised to withhold further payments under the terminated contract pending additional instructions, which shall be given when sufficient information is available.

(f) If the contracting officer determines that the contractor's failure to perform arose from causes beyond its control and without its fault or negligence, the contracting officer shall not terminate the contract for default. Under such circumstances, if it is in the best interests of the Government to do so, the contracting officer may terminate the contract for the convenience of the Government.

(g) If the contracting officer has not been able to determine, prior to issuance of the notice of termination, whether the contractor's failure to perform arose from causes beyond its control and without its fault or negligence, he shall make a written decision on that point as soon as practicable after issuance of the notice of termination. Such decision shall be delivered promptly to the contractor with a notification that it has the right to appeal as specified in the Disputes clause.

§ 8.602–4 Procedure in lieu of termination for default.

The following courses of action, among others, are available to the contracting officer in lieu of termination for default, when in the best interest of the Government:

(a) Permit the contractor, its surety, or its guarantor, to continue performance of the contract under a revised delivery schedule;

(b) Permit the contractor to continue performance of the contract by means of a subcontract, or other business arrangement with an acceptable third party: *Provided,* The rights of the Government are adequately preserved; or

(c) If the requirement for the supplies and services specified in the contract no longer exists, and the contractor is not liable to the Government for damages as provided in § 8.602–7, execute a no-cost termination settlement agreement utilizing the form set forth in §§ 8.806–6 and 8.806–7 as a guide.

§ 8.602–5 Memorandum by the contracting officer.

In all cases where a contract is terminated for default or where a procedure authorized by § 8.602–4 is followed, the contracting officer shall prepare a memorandum for the contract file explaining fully the reascns for the action taken.

§ 8.602–6 Repurchase against contractors account.

(a) Where the supplies or services are still required after termination, repurchase of supplies or services which are the same as or similiar to those called for in the contract, shall be made against the contractor's account as soon as practicable after termination. Such repurchase shall be at as reasonable a price as practicable considering the quality required by the Government and the time within which the supplies or services are required. The contract of repurchase may be made for a quantity in excess of the undelivered quantity terminated for default, when such excess quantity is needed, but excess costs may be charged against the defaulting contractor for no more than the undelivered quantity terminated for default (including variations in quantity permitted by the terminated contract).

(b) If the repurchase is for a quantity not in excess of the undelivered quantity terminated for default, the requirements of 10 U.S.C. 2304(a), with respect to formal advertising, are inapplicable. However, the contracting officer may use formal advertising procedures. If the contracting officer decides to negotiate the repurchase contract, he may either (1) use any authority listed in §§ 3.201 through 3.217 of this subchapter (10 U.S.C. 2304(a)(1)–(17)), as appropriate, or (2) if none of those authorities to negotiate are used, the contract shall identify the procurement as a repurchase in accordance with the provisions of the Default clause in the defaulted contract. If the repurchase is for a quantity in excess of the undelivered quantity terminated for default, the entire quantity shall be treated as new procurement.

(c) If repurchase is effected at a price in excess of the price of the supplies terminated, the contracting officer shall make a written demand on the contractor for the total amount of such excess and if the contractor fails to make payment, the contracting officer shall follow Departmental procedures for collecting claims in favor of the Government.

§ 8.602–7 Other damages.

(a) If a contract is terminated for default or if a course of action in lieu of termination for default is followed (see § 8.602–4), the contracting officer shall promptly ascertain and make demand for any liquidated damages to which the Government may be entitled under the contract. Pursuant to the contract provisions for liquidated damages in § 7.105–5, such damages are in addition to any excess cost of reprocurement.

(b) If the Government has suffered any other ascertainable damages as a result of the contractor's default, the contracting officer, on the basis of legal advice, shall take appropriate action to assert the Government's claim for such damages.

§ 8.603 Termination of fixed-price construction contracts for default.

§ 8.603–1 Termination of the contractor's right to proceed.

Under contracts containing the Termination for Default—Damages for Delay—Time Extensions clause set forth in § 8.709, the Government has the right to terminate the contractor's right to proceed with the work if the contractor (a) fails to prosecute the work required by the contract, or any separable part thereof, with such diligence as will insure its completion within the time specified in the contract or any extension thereof, or (b) fails to complete the work required under the contract within such time.

§ 8.603–2 Effect of termination for default.

If a contractor's right to proceed is terminated for default, the Government may take over and complete or cause to be completed the work, taking possession of and utilizing such materials, appliances and plant as may be on the site and necessary therefor, and the contractor and its sureties shall be liable to the Government for any excess costs caused thereby. If after taking over the work the Government is not reasonably able to complete it, or have it completed, within the time specified for completion in the defaulted contract,

the contractor shall, in addition to any excess costs, be liable for liquidated damages for the delay as specified in the contract, or for actual damages caused by the delay if liquidated damages are not so specified.

§ 8.603–3 Procedure for default.

(a) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The provisions of the contract, and applicable laws and regulations;

(2) The specific failure of the contractor and excuses, if any, for such failure;

(3) The period of time which would be required for the Government or another contractor to complete the work as compared to the time required for completion by the delinquent contractor;

(4) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments; and

(5) Any other pertinent facts and circumstances.

(b) If the contracting officer determines that the contractor's failure to perform arises from causes beyond its control and without its fault or negligence, the contracting officer shall not terminate the contractor's right to proceed, nor shall the contractor be charged with liquidated or actual damages because of any delays occasioned by such causes.

(c) If the contracting officer determines that it is in the best interests of the Government to terminate for default the contractor's right to proceed, the contracting officer shall promptly send a written notice to the contractor terminating its right to proceed. The notice shall:

(1) Set forth the contract number and date;

(2) Describe the act or omissions, and the extent of the resultant delay, constituting the default;

(3) State that the contractor's right to proceed further with performance of the contract (or of a specified portion of the contract) is terminated;

(4) State that the Government may cause the contract to be completed and that the contractor will be held liable for any excess costs;

(5) State that the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs;

(6) State that the notice constitutes a decision, pursuant to the Disputes clause, that the contractor is in default as specified and that the delay is not excusable; and

(7) State that the contractor has the right to appeal as specified in the Disputes clause.

(d) The same distribution shall be made of the termination notice as was made of the contract, including a copy to the surety. In addition, a copy shall be furnished to the disbursing officer who shall be advised to withhold further payments under the terminated contract pending additional instructions which shall be given when sufficient information is available.

(e) Promptly after issuance of the termination notice, the contracting officer shall determine the manner in which the work is to be completed and whether the materials, appliances, and plant which are on the site will be needed.

§ 8.603–4 Procedure in lieu of termination for default.

If, after due consideration, the contracting officer determines that termination is not in the best interests of the Government although the contractor is in default, he may permit the contractor to continue the work, and the contractor and its sureties shall be liable to the Government for liquidated damages, as specified in the contract, or if liquidated damages are not so specified, to any actual damages occasioned by the failure of the contractor to complete the work in accordance with the terms of the contract.

§ 8.603–5 Memorandum by the contracting officer.

In all cases where a contractor's right to proceed is terminated for default or where the procedure authorized by § 8.603–4 is followed, the contracting officer shall prepare a memorandum for the contract file explaining fully the reasons for the action taken.

§ 8.603–6 Other damages.

In addition to any excess costs occasioned the Government in connection with the completion of the work, the contractor and its surety are liable for liquidated damages, if specified in the contract, or if liquidated damages are not specified, for any actual damages occasioned by such delay. All retained percentages of progress payments previously made to the contractor and any progress payments due for work completed prior to the termination of the right to proceed shall be used for the purpose of liquidating the liability of the contractor and its surety to the Government for such excess costs and liquidated or actual damages.

Subpart G—Clauses

§ 8.700 Scope of subpart.

This subpart contains certain contract clauses related to the termination of contracts for the convenience of the Government and for default. Special purpose clauses when authorized by Departmental procedures and consistent with the policies set forth in this subchapter may be used in appropriate cases.

§ 8.701 Termination clause for fixed-price contracts.

Except as otherwise permitted by § 8.705, the following clause shall be used in any fixed-price contract in excess of $1,000 for supplies or experimental, developmental, or research work other than (a) construction, alterations, or repair of buildings, bridges, roads, or other kinds of real property, or (b) experimental, developmental, or research work with educational or nonprofit institutions, where no profit is contemplated.

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (OCT. 1959)

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall:

(1) Stop work under the contract on the date and to the extent specified in the Notice of Termination;

(2) Place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;

(3) Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;

(4) Assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(5) Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

(6) Transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information and other property which, if the contract had been completed, would have been required to be furnished to the Government;

(7) Use its best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in (6) above: *Provided, however,* That the Contractor (A) shall not be required to extend credit to any purchaser, and (B) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer; *And provided further,* That the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct;

(8) Complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and

(9) Take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which

the Government has or may acquire an interest.

At any time after expiration of the plant clearance period, as defined in 32 CFR Part 8, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same: *Provided,* That the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer its termination claim, in the form and with certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer, upon request of the Contractor made in writing within such one year period or authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such one year period or any extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer may, subject to any Settlement Review Board approvals required by 32 CFR Part 8 in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), and subject to any Settlement Review Board approvals required by 32 CFR Part 8 in effect as of the date of execution of this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done: *Provided,* That such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board approvals required by 32 CFR Part 8 in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(1) For completed supplies accepted by the Government (or sold or acquired as provided in paragraph (b) (7) above) and not theretofore paid for, a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges;

(2) The total of—

(A) The costs incurred in the performance of the work terminated, including initial costs and preparatory expense allocable thereto, but exclusive of any costs attributable to supplies paid or to be paid for under paragraph (e) (1) hereof;

(B) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b) (5) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts shall be included in the costs payable under (A) above; and

(C) A sum, as a profit, equal to 2 percent of that part of the amount determined under (A) above which represents the cost of articles and materials not processed by the Contractor, plus a sum equal to 8 percent of the remainder of such amount, but the aggregate of such sums shall not exceed 6 percent of the whole of the amount determined under (A) above, which amount for the purpose of this subdivision (C) shall exclude any charges for interest on borrowings: *Provided, however,* That if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(3) The reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to this contract.

The total sum to be paid to the Contractor under (1) and (2) of this paragraph (e) shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in (e) (1) and (2) (A) above, the fair value, as determined by the Contracting Officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b) (7).

(f) Any determination of costs under paragraph (c) or (e) thereof shall be governed by the principles for consideration of costs set forth in 32 CFR 8.302, as in effect on the date of this contract.

(g) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes," from any determination made by the Contractting Officer under paragraphs (c) or (e) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time, it shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) If there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the Contractor under this clause there shall be deducted (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract, (ii) any claim which the Government may have against the Contractor in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(i) If the determination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government: *Provided, however,* That no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the Office of the Contractor but without direct charge to the Government, all its books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, micro-photographs, or other authentic reproductions thereof.

§ 8.702 Termination clause for cost-reimbursement type contracts.

The following clause shall be used in any cost-reimbursement type contract,

as defined in § 3.404, of this chapter, for supplies and experimental, developmental, or research work other than (a) construction, alterations, or repair of buildings, bridges, roads, or other kinds of real property, or (b) experimental, developmental, or research work with educational or nonprofit institutions, where no fee is contemplated.

TERMINATION (OCT. 1959)

(a) The performance of work under the contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part:

(1) Whenever the Contractor shall default in performance of this contract in accordance with its terms (including in the term "default" any such failure by the Contractor to make progress in the prosecution of the work hereunder as endangers such performance), and shall fail to cure such default within a period of ten days (or such longer periods as the Contracting Officer may allow) after receipt from the Contracting Officer of a notice specifying the default; or

(2) Whenever for any reason the Contracting Officer shall determine that such termination is in the best interests of the Government.

Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying whether termination is for the default of the Contractor or for the convenience of the Government, the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective. If, after notice of termination of this contract for default under (1) above, it is determined that the Contractor's failure to perform or to make progress in performance is due to causes beyond the control and without the fault or negligence of the Contractor pursuant to the provisions of the clause of this contract relating to excusable delays, the Notice of Termination shall be deemed to have been issued under (2) above, and the rights and obligations of the parties hereto shall in such event be governed accordingly.

(b) After receipt of a Notice of Termination and except as otherwise directed by the Contracting Officer, the Contractor shall:

(1) Stop work under the contract on the date and to the extent specified in the Notice of Termination;

(2) Place no further orders or subcontracts for materials, services, or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;

(3) Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;

(4) Assign to the Government, in the manner and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders or subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(5) With the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final and conclusive for all purposes of this clause, settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, the cost of which would be reimbursable in whole or in part, in accordance with the provisions of this contract;

(6) Transfer title (to the extent that title has not already been transferred) and, in the manner, to the extent, and at the times directed by the Contracting Officer, deliver to the Government (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in respect of the performance of, the work terminated by the Notice of Termination, (B) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would be required to be furnished to the Government, and (C) the jigs, dies, and fixtures, and other special tools and tooling acquired or manufactured for the performance of this contract for the cost of which the Contractor has been or will be reimbursed under this contract;

(7) Use its best efforts to sell in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in (6) above: *Provided, however,* That the Contractor (A) shall not be required to extend credit to any purchaser, and (B) may acquire any such property under the conditions prescribed by and at a price or prices approved by the Contracting Officer: *And provided further,* That the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct;

(8) Complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and

(9) Take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of Contractor in which the Government has or may acquire an interest. The Contractor shall proceed immediately with the performance of the above obligations notwithstanding any delay in determining or adjusting the amount of the fee, or any item of reimbursable cost, under this clause. At any time after expiration of the plant clearance period, as defined in 32 CFR Part 8, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept such items and remove them or enter into a storage agreement covering the same: *Provided,* That the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer its termination claim in the form and with the certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer, upon request of the Contractor made in writing within such one year period or authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such one year period or any extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer may, subject to any Settlement Review Board approvals required by 32 CFR Part 8 in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), and subject to any Settlement Review Board approvals required by 32 CFR Part 8 in effect as of the date of execution of this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid (including an allowance for the fee) to the Contractor by reason of the total or partial termination of work pursuant to this clause. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount.

(e) In the event of the failure of the Contractor and the Contracting Officer to agree in whole or in part, as provided in paragraph (d), as to the amounts with respect to costs and fee, or as to the amount of the fee, to be paid to the Contractor in connection with the termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board approvals required by 32 CFR Part 8 in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amount determined as follows:

(1) If the settlement includes cost and fee—

(A) There shall be included therein all costs and expenses reimbursable in accordance with this contract, not previously paid to the Contractor for the performance of this contract prior to the effective date of the Notice of Termination, and such of these costs as may continue for a reasonable time thereafter with the approval of or as directed by the Contracting Officer: *Provided, however,* That the Contractor shall proceed as rapidly as practicable to discontinue such costs;

(B) There shall be included therein so far as not included under (A) above, the cost of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b) (5) above, which are properly chargeable to the terminated portion of the contract;

(C) There shall be included therein the reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of termination inventory: *Provided, however,* That if the termination is for default of the Contractor there shall not be included any amounts for the preparation of the Contractor's settlement proposal; and

(D) There shall be included therein a portion of the fee payable under the contract determined as follows—

(I) In the event of the termination of this contract for the convenience of the Government and not for the default of the Contractor, there shall be paid a percentage of the fee equivalent to the percentage of the completion of work contemplated by the contract, less fee payments previously made hereunder; or

(II) In the event of the termination of this contract for the default of the Contractor, the total fee payable shall be such proportionate part of the fee (or, if this contract calls for articles of different types, of such part of the fee as is reasonably allocable to the type of article under consideration) as

the total number of articles delivered to and accepted by the Government bears to the total number of articles of a like kind called for by this contract;

If the amount determined under this subparagraph (1) is less than the total payment theretofore made to the Contractor, the Contractor shall repay to the Government the excess amount; or

(2) If the settlement includes only the fee, the amount thereof will be determined in accordance with subparagraph (D) above.

(f) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes," from any determination made by the Contracting Officer under paragraph (c) or (e) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time, it shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) If there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(g) In arriving at the amount due the Contractor under this clause there shall be deducted (i) all unliquidated advance or other payments theretofore made to the Contractor, applicable to the terminated portion of this contract, (ii) any claim which the Government may have against the Contractor in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Contractor or sold pursuant to the provisions of this clause and not otherwise recovered by or credited to the Government.

(h) In the event of a partial termination, the portion of the fee which is payable with respect to the work under the continued portion of the contract shall be equitably adjusted by agreement between the Contractor and the Contracting Officer, and such adjustment shall be evidenced by an amendment to this contract.

(i) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of the contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government: *Provided, however,* That no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.

(j) The provisions of this clause relating to the fee shall be inapplicable if this contract does not provide for payment of a fee.

§ 8.703 Termination clause for fixed-price construction contracts.

The following clause shall be inserted in all fixed-price type construction contracts in excess of $10,000.

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (OCT. 1959)

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall:

(1) Stop work under the contract on the date and to the extent specified in the Notice of Termination;

(2) Place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of such portion of the work under the contract as is not terminated;

(3) Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;

(4) Assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(5) Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

(6) Transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information, and other property which, if the contract has been completed, would have been required to be furnished to the Government;

(7) Use its best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in (6) above: *Provided, however,* That the Contractor, (A) shall not be required to extend credit to any purchaser, and (B) may acquire any such property under the conditions prescribed and at a price or prices approved by the Contracting Officer: *And provided further,* That the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting officer may direct;

(8) Complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and

(9) Take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

At any time after expiration of the plant clearance period, as defined in 32 CFR Part 8, as it may be amended from time to time, the Contractor may submit to the Contracting Officer a list, certified as to quantity and quality, of any or all items of termination inventory not previously disposed of, exclusive of items the disposition of which has been directed or authorized by the Contracting Officer, and may request the Government to remove such items or enter into a storage agreement covering them. Not later than fifteen (15) days thereafter, the Government will accept title to such items and remove them or enter into a storage agreement covering the same: *Provided,* That the list submitted shall be subject to verification by the Contracting Officer upon removal of the items, or if the items are stored, within forty-five (45) days from the date of submission of the list, and any necessary adjustment to correct the list as submitted shall be made prior to final settlement.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer its termination claim, in the form and with the certification prescribed by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer, upon request of the Contractor made in writing within such one year period or authorized extension thereof. However, if the Contracting Officer determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such one year period or extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer may, subject to any Settlement Review Board approvals required by 32 CFR Part 8 in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), and subject to any Settlement Review Board Approvals required by 32 CFR Part 8 in effect as of the date of execution of this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done: *Provided,* That such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the Contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the Termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board approvals required by 32 CFR Part 8

in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(1) With respect to all contract work performed prior to the effective date of the Notice of Termination, the total (without duplication of any items) of—

(A) The cost of such work;

(B) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders as provided in paragraph (b) (5) above, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the Notice of Termination of work under this contract, which amounts shall be included in the cost on account of which payment is made under (A) above; and

(C) A sum, as a profit, equal to 2 percent of the part of the amount determined under (A) above which represents the cost of articles or materials delivered to the site but not incorporated in the work in place on the effective date of the Notice of Termination, plus a sum equal to 8 percent of the remainder of such amount, but the aggregate of such sums shall not exceed 6 percent of the whole of the amount determined under (A) above, which amount for purposes of this subdivision (C) shall exclude any charges for interest on borrowings: *Provided, however,* That if it appears that the Contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate or loss; and

(2) The reasonable cost of the preservation and protection of property incurred pursuant to paragraph (b) (9); and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the Contractor as the result of the termination of work under this contract.

The total sum to be paid to the Contractor under (1) above shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor under (1) above, the fair value, as determined by the Contracting Officer, of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b) (7).

(f) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the principles for consideration of costs set forth in 32 CFR 8.302 as in effect on the date of this contract.

(g) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes," from any determination made by the Contracting Officer under paragraphs (c) or (e) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time, it shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) If there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal.

(h) In arriving at the amount due the Contractor under this clause there shall be deducted (i) all unliquidated advance or other payments on account theretofore made to the Contractor, applicable to the terminated portion of this contract, (ii) any claim which the Government may have against the Contractor in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things kept by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(i) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices; however, nothing contained herein shall limit the right of the Government and the Contractor to agree upon the amount or amounts to be paid to the Contractor for the completion of the continued portion of the contract when said contract does not contain an established contract price for such continued portion.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government: *Provided, however,* That no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the office of the Contractor but without direct charge to the Government, all its books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, micro-photographs, or other authentic reproductions thereof.

§ 8.704 Research and development contracts with educational and other nonprofit institutions.

§ 8.704–1 Termination clause.

The following clause shall be used in any contract for experimental, developmental, or research work (whether fixed-price or cost-reimbursement type) with an educational or nonprofit institution; *Provided* such contract is placed on a no-fee or no-profit basis.

TERMINATION FOR THE CONVENIENCE OF THE GOVERNMENT (SEPT. 1958)

(a) The performance of work under this contract may be terminated, in whole or from time to time in part, by the Government whenever for any reason the Contracting Officer shall determine that such termination is in the best interests of the Government. Termination of work hereunder shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated and the date upon which such termination becomes effective.

(b) After receipt of the Notice of Termination the Contractor shall cancel its outstanding commitments hereunder covering the procurement of materials, supplies, equipment and miscellaneous items. In addition the Contractor shall exercise all reasonable diligence to accomplish the cancellation or diversion of its outstanding commitments covering personal services and extending beyond the date of such termination to the extent that they relate to the performance of any work terminated by the notice. With respect to such cancelled commitments the Contractor agrees to (i) settle all outstanding liabilities and all claims arising out of such cancellation of commitments, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all purposes of this clause, and (ii) assign to the Government, in the manner, at the time, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts.

(c) The Contractor shall submit its termination claim to the Contracting Officer promptly after receipt of a Notice of Termination, but in no event later than one year from the effective date thereof, unless one or more extensions in writing are granted by the Contracting Officer upon written request of the Contractor within such one year period or authorized extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer may, subject to any Settlement Review Board approvals required by 32 CFR Part 8 in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall thereupon pay to the Contractor the amount so determined.

(d) Any determination of costs under paragraph (c) shall be governed by the cost principles set forth in 32 CFR 8.213, as in effect on the date of this contract.

(e) Subject to the provisions of paragraph (c) above, and subject to any Settlement Review Board approvals required by 32 CFR Part 8 in effect as of the date of execution of this contract, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the termination under this clause, which amount or amounts may include any reasonable cancellation charges thereby incurred by the Contractor and any reasonable loss upon outstanding commitments for personal services which it is unable to cancel: *Provided, however,* That in connection with any outstanding commitments for personal services which the Contractor is unable to cancel, the Contractor shall have exercised reasonable diligence to divert such commitments to its other activities and operations. Any such agreement shall be embodied in an

amendment to this contract and the Contractor shall be paid the agreed amount.

(f) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments against costs incurred by the Contractor in connection with the terminated portion of this contract, whenever, in the opinion of the Contracting Officer, the aggregate of such payments is within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand: *Provided*, That if such excess is not so paid upon demand, interest thereon shall be payable by the contractor to the Government at the rate of 6 percent per annum, beginning 30 days from the date of such demand.

(g) The Contractor agrees to transfer title and deliver to the Government, in the manner, at the time, and to the extent, if any, directed by the Contracting Officer, such information and items which, if the contract had been completed, would have been required to be furnished to the Government, including:

(1) Completed or partially completed plans, drawings and information; and

(2) Materials or equipment produced or in process or acquired in connection with the performance of the work terminated by the notice.

Other than the above, any termination inventory resulting from the termination of the contract may, with the written approval of the Contracting Officer, be sold or acquired by the Contractor under the conditions prescribed by and at a price or prices approved by the Contracting Officer. The proceeds of any such disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of work covered by this contract or paid in such other manner as the Contracting Officer may direct. Pending final disposition of property arising from the termination, the Contractor agrees to take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

(h) Any disputes as to questions of fact which may arise hereunder shall be subject to the "Disputes" clause of this contract.

§ 8.704–2 Suggested clause for subcontracts.

The above clause, suitably altered to indicate the relationship between the prime contractor and subcontractor, is suggested for use in subcontracts placed with educational or nonprofit institutions: *Provided*, Such subcontracts incorporate, or are negotiated on the basis of, the cost principles set forth in Part 15, Subpart C of this chapter; and *Provided further*, such subcontracts are placed on the no-fee or no-profit basis.

§ 8.705 Short form termination clauses for fixed-price type contracts.

§ 8.705–1 Supply and service contracts.

In order to facilitate:

(a) The handling of purchases under fixed-price supply contracts not to exceed $10,000; and

(b) The obtaining of services where it is intended that a termination claim will not be made in the event of termination for the convenience of the Government, such as contracts for, but not limited to, rental of unreserved garage space, meals for inductees, laundry, and dry-cleaning services;

the short form termination clause set forth below is authorized for use in lieu of any other clause providing for termination for the convenience of the Government; provided, such contracts obligate the Government to order or otherwise to be liable for a minimum quantity:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (JAN. 1960)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the best interest of the Government. If this contract is for supplies and is so terminated, the Contractor shall be compensated in accordance with ASPR Section VIII, in effect on this contract's date. To the extent that this contract is for services and is so terminated, the Government shall be liable only for payment in accordance with the payment provisions of this contract for services rendered prior to the effective date of termination.

§ 8.705–2 Construction contracts.

Generally, there is no need for a termination clause in construction contracts not in excess of $10,000. However, where the contracting officer determines that a termination clause should be included in such a contract, the following clause shall be used.

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (OCT. 1960)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the interest of the Government. If this contract is terminated, the Contractor shall be compensated in accordance with Section VIII of the Armed Services Procurement Regulation, in effect on this contract's date.

§ 8.706 Subcontract termination clause.

The following termination clause is suggested for use in fixed-price subcontracts:

TERMINATION (OCT. 1959)

(a) The performance of work under this contract may be terminated, in whole or from time to time in part, by the buyer in accordance with this clause. Termination of work hereunder shall be effected by delivery to the seller of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination and except as otherwise directed by the buyer, the seller shall:

(1) Stop work under the contract on the date and to the extent specified in the Notice of Termination;

(2) Place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of such portions of the work under the contract as may not be terminated.

(3) Terminate all orders and subcontracts to the extent that they relate to the performance of any work terminated by the Notice of Termination;

(4) Assign to the buyer, in the manner, and to the extent directed by the buyer, all of the right, title and interest of its seller under the orders of subcontracts so terminated;

(5) Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts subject to the approval or ratification of the buyer to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

(6) Transfer title and deliver to the buyer in the manner, to the extent, and at the times directed by the buyer (A) the fabricated or unfabricated parts, work in process, completed work, supplies and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would be required to be furnished to the buyer;

(7) Use his best efforts to sell in the manner, to the extent, at the time, and at the price or prices directed or authorized by the buyer, any property of the types referred to in (6) above: *Provided, however*, That the seller (A) shall not be required to extend credit to any purchaser, and (B) may acquire any such property under the conditions prescribed by and at a price or prices approved by the buyer: *And provided further*, That the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the buyer to the seller under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the buyer may direct;

(8) Complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and

(9) Take such action as may be necessary or as the buyer may direct for protection and preservation of the property related to this contract which is in the possession of the seller and in which the buyer or the Government has or may acquire an interest.

(c) After receipt of a Notice of Termination, the seller shall submit to the buyer its termination claim, in the form and with the certification prescribed by the buyer. Such claim shall be submitted promptly, but not later than six (6) months from the effective date of termination. Upon failure of the seller to submit its termination claim within the time allowed, the buyer may determine, on the basis of information available to it, the amount, if any, due to the seller in respect to the termination and such determination shall be final. After the buyer has made a determination under this paragraph, it shall pay the seller the amount so determined.

(d) Subject to the provisions of paragraph (c) the seller and the buyer may agree upon the whole or any part of the amount or amounts to be paid to the seller by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit on work done and the buyer shall pay the agreed amount or amounts: *Provided*, That such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Nothing in paragraph (e) below prescribing the amount to be paid to the seller in the event of the failure of the seller and the buyer to agree upon the whole amount to be paid to the seller by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or effect the amount or amounts which may be agreed upon to be paid to the seller pursuant to this paragraph (d).

(e) In the event of the failure of the seller and the buyer to agree as provided in paragraph (d) upon the whole amount to be paid to the seller by reason of the termination of work pursuant to this clause, the buyer,

but without duplication of any amounts agreed upon in accordance with paragraph (d), shall pay to the seller the following amounts:

(1) For completed supplies accepted by the buyer (or sold or acquired as provided in paragraph (b) (7) above) and not theretofore paid for, forthwith a sum equivalent to the aggregate price for such supplies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges;

(2) In respect of the work terminated as permitted by this clause, the total (without duplication of any items) of—

(A) The cost of such work, including initial costs and preparatory expenses allocable thereto, exclusive of any costs attributable to supplies paid or to be paid for under (1) above; and

(B) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders as provided in paragraph (b) (5) above, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the Notice of Termination of work under this contract, which amounts shall be included in the cost on account of which payment is made under (A) above; and

(C) A sum, as a profit, equal to 2 percent of the part of the amount determined under (A) above which represents the cost of articles and materials not processed by the seller, plus a sum equal to 8 percent of the remainder of such amount, but the aggregate of such sum shall not exceed 6 percent of the whole of the amount determined under (A) above, which amount for the purpose of this subdivision (C) shall exclude any charges for interest on borrowings: *Provided, however,* That if it appears that the seller would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this subdivision (C) and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(3) The reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of the property allocable to this contract.

The total sum to be paid to the seller under (1) and (2) above shall not exceed the total contract price reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage and except to the extent that the buyer or the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the seller under (1) and (2) (A) above the fair value as determined by the buyer of property which is destroyed, lost, stolen, or damaged so as to become undeliverable to the buyer or to a purchaser pursuant to paragraph (b) (7).

(f) The obligation of the buyer to make any payments under this clause shall be subject to deductions with respect to (i) all unliquidated advance or other payments on account theretofore made to the seller applicable to the terminated portion of this contract, (ii) any claim which the buyer may have against the seller, in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things retained by the seller or sold, and not otherwise recovered by or credited to the buyer.

(g) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the seller may file with the buyer a request in writing that an equitable adjustment be made in the price or prices specified in the contract for the work in connection with the continued portion not terminated by the Notice of Termination, and the appropriate equitable adjustment shall be made in such price or prices.

(h) The buyer may, from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the seller in respect to the terminated portion of the contract, whenever in the opinion of the buyer the aggregate of such payments shall be within the amount to which the seller will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed upon or determined to be due under this clause, such excess shall be payable by the seller to the buyer upon demand, together with interest computed at the rate of 6 percent per annum, for the period from the date such excess payment is received by the seller to the date on which such excess is repaid: *Provided, however,* That no interest shall be charged with respect to any such excess payment attributable to a reduction in the seller's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the buyer by reason of the circumstances.

(i) For the purpose of paragraphs (c) and (e) above, the amounts of the payments to be made by the buyer to the seller shall be determined in conformity with the policies and principles set forth in Section VIII of the Armed Services Procurement Regulation in effect at the date of this contract. Unless otherwise provided for in this contract, or by applicable statute, the seller, for a period of three years after final settlement under the contract shall make available to the buyer and the Government at all reasonable times at the office of the seller all its books, records, documents, or other evidence bearing on the costs and expenses of the seller under the contract and in respect of the termination of work hereunder or, to the extent approved by the Government, photographs, microphotographs, or other authentic reproductions thereof.

§ 8.707 Default clause for fixed-price supply contracts.

The following clause shall be used in all fixed-price supply contracts as defined in § 7.102.

DEFAULT (JUNE 1958)

(a) The Government may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in any one of the following circumstances:

(1) If the Contractor fails to make delivery of the supplies or to perform the services within the time specified herein or any extension thereof; or

(2) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Government for any excess costs for such similar supplies or services: *Provided,* That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer, (i) any completed supplies, and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest. Payment for completed supplies delivered to and accepted by the Government shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Government and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and Contracting Officer; failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Dispute".

(e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract is due to causes beyond the control and without the fault or negligence of the Contractor or subcontractor pursuant to the provisions of paragraph (c) of this clause, such notice of default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. (Except as otherwise provided in this contract, this paragraph (e) applies only if this contract contains such clause.)

(f) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

§ 8.708 Excusable delays clause for cost-reimbursement type supply contracts.

The following clause shall be used in all cost-reimbursement type supply contracts as defined in § 7.202 of this chapter and in all cost-reimbursement type research and development contracts that contain the Termination clause in § 8.702. It may be used in contracts that contain the Termination clause in § 8.704.

EXCUSABLE DELAYS (JULY 1958)

Except with respect to defaults of subcontractors, the Contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the Contractor to make progress in the prosecution of the work hereunder which endangers such performance) if such failure arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to: acts of God or of the public enemy; acts of the Government in either its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes; freight embargoes; and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the failure of a subcontractor to perform or make progress, and if such failure arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be deemed to be in default, unless (i) the supplies or services to be furnished by the subcontractor were obtainable from other sources, (ii) the Contracting Officer shall have ordered the Contractor in writing to procure such supplies or services from such other sources, and (iii) the Contractor shall have failed to comply reasonably with such order. Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of such failure and, if he shall determine that any failure to perform was occasioned by any one or more of the said causes, the delivery schedule shall be revised accordingly, subject to the rights of the Government under the clause hereof entitled "Termination."

§ 8.709 Default clause for fixed-price construction contracts.

(a) The following clause shall be used in all fixed-price construction contracts.

TERMINATION FOR DEFAULT—DAMAGES FOR DELAY—TIME EXTENSIONS (SEPT. 1958)

(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate its right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and its sureties shall be liable to the Government for any excess cost occasioned the Government thereby, and for liquidated damages for delay, as fixed in the specifications or accompanying papers, until such reasonable time as may be required for the final completion of the work, or if liquidated damages are not so fixed, any actual damages occasioned by such delay. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

(b) If the Government does not terminate the right of the Contractor to proceed, as provided in paragraph (a) hereof, the Contractor shall continue the work, in which event the Contractor and its sureties shall be liable to the Government, in the amount set forth in the specifications or accompanying papers, for fixed, agreed and liquidated damages for each calendar day of delay until the work is completed or accepted, or if liquidated damages are not so fixed, any actual damages occasioned by such delay.

(c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, or delays of subcontractors or suppliers due to such causes: *Provided*, That the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal as provided by the Disputes clause of this contract.

(d) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause, it is determined that the failure to perform this contract was due to causes beyond the control and without the fault or negligence of the Contractor pursuant to paragraph (c) of this clause, such notice of termination shall be deemed to have been issued pursuant to the Termination for Convenience of the Government clause of this contract, and the rights and obligations of the parties hereto shall in such event be governed by such clause.

(e) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

(b) During a period of national emergency, paragraph (c) of the above clause may be changed by deleting the word "unforeseeable" and inserting the phrase "other than normal weather," after the word "causes" where it first appears in the first sentence.

(c) Standard Form 23a is prescribed for use in all formally advertised construction contracts. That Form contains, as clause 5, paragraphs (a) through (c) of the above clause. When that Form is used, paragraphs (d) and (e) of the above clause shall be added to the Form by means of an Alterations in Contract clause (see § 7.105–1 of this chapter).

§ 8.710 Default clause for fixed-price research and development contracts.

The following clause shall be used in all fixed-price research and development contracts as defined in § 7.301 of this chapter except contracts with educational or nonprofit institutions which are awarded on the basis of no profit:

DEFAULT (JUNE 1959)

(a) The Government may, subject to the provisions of paragraph (b) of this clause, by written Notice of Default to the Contractor terminate the whole or any part of this contract in any one of the following circumstances:

(i) If the Contractor fails to perform the work called for by this contract within the time(s) specified herein or any extension thereof; or

(ii) If the Contractor fails to perform any of the other provisions of this contract, or so fails to prosecute the work as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

(b) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or service to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule or other performance requirements.

(c) In the event the Government terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Government may procure, upon such terms and in such manner as the Contracting Officer may deem appropriate, work similar to the work so terminated and the Contractor shall be liable to the Government for any excess costs for such similar work: *Provided*, That the Contractor shall continue the performance of this contract to the extent not terminated under the provisions of this clause.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Government, in the manner and to the extent directed by the Contracting Officer any of the completed or partially completed work not theretofore delivered to, and accepted by, the Government and any other property, including contract rights, specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon the direction of the Contracting Officer, protect and preserve property in the possession of the Contractor in which the Government has an interest. The Government shall pay to the Contractor the contract price, if separately stated, for completed work accepted by the Government and the amount agreed upon by the Contractor and the Contracting Officer for (i) completed work for which no separate price is stated, (ii) partially com-

pleted work, (iii) other property described above which is accepted by the Government and, (iv) the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(e) If, after notice of termination of this contract under the provisions of paragraph (a) of this clause it is determined that the failure to perform this contract or to prosecute the work so as to endanger performance of the contract is due to causes beyond the control and without the fault or negligence of the Contractor pursuant to the provisions of paragraph (b) of this clause, such Notice of Default shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause.

(f) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

Subpart H—Forms

§ 8.800 Scope of subpart.

This subpart contains certain forms related to the termination and settlement of contracts.

§ 8.801 Notice of termination.

§ 8.801–1 Telegraphic notice of termination.

(a) The following form of telegraphic notice is approved for use where a contract is being completely terminated:

TELEGRAPHIC NOTICE—COMPLETE TERMINATION (JAN. 1952)

Date ----------

XYZ Corporation
New York, New York

Your contract No. ------ is hereby terminated in its entirety pursuant to clause ------ of the contract effective [Here insert "immediately" or "On ----------, 19--." (Inserting the date) or "As soon as you have delivered thereunder including previous deliveries the following items" (listing items)]. Immediately stop all work, terminate subcontracts and place no further orders except to extent (Insert if applicable—Necessary to perform any portion thereof not terminated hereby or) that you or a subcontractor wish to retain and continue for own account any work in process or other materials. Telegraph similar instructions to all subcontractors and suppliers. Letter and instruction follow.

(Name and Rank)
Contracting Officer

(b) The following form of telegraphic notice is approved where a contract is being partially terminated:

TELEGRAPHIC NOTICE OF PARTIAL TERMINATION (JAN. 1952)

Date----------

XYZ Corporation
New York, New York

Your contract No. ------ is hereby partially terminated pursuant to clause ------ of the contract effective on ---------- 19--, on which date you will reduce its total number of items to be delivered as follows (inserting instructions as to reduced deliveries). Immediately stop all work, terminate subcontracts and place no further orders except to extent necessary to perform any portion thereof not terminated hereby or that you or a subcontractor wish to retain and continue for own account any work in process or other materials. Telegraph similar instructions to all subcontractors and suppliers. Letter and instructions follow.

(Name and Rank)
Contracting Officer

§ 8.801–2 Letter notice of termination.

(a) The following form of Notice of Termination of prime contract is approved for use. With appropriate modifications it is suitable for use in terminating subcontracts.

LETTER NOTICE OF TERMINATION TO PRIME CONTRACTORS (SEPT. 1958)

[At the top of the Notice set out all special details relating to the particular termination: e. g., name and address of company, number of prime contract terminated, service involved, appropriation or allotment, etc.

Two alternative forms of paragraph No. 1 are set out below. If this written termination notice confirms a telegraphic notice previously sent, use the first of the alternative paragraphs No. 1 below. If no previous telegraphic notice has been sent, use the second.]

1. *Effective date of termination.* This letter will confirm the Government's telegram to you dated ----------, 19--, terminating [in part] your Contract No. ------ (hereinafter referred to as "the contract") for the convenience of the Government, in accordance with the clause thereof entitled "Termination for the Convenience of the Government" [or, in the case of a cost-reimbursement-type contract, "Termination"]. Such termination is effective on the date and in the manner stated in such telegram, reference to which is hereby made [or copy of which is attached hereto].

(or)

1. *Effective date of termination.* You are notified that your Contract No. ------ (hereinafter referred to as "the contract") is hereby terminated [in part] for the convenience of the Government, in accordance with the clause hereof entitled "Termination for the Convenience of the Government" [or, in the case of a cost-reimbursement-type contract, "Termination"]. Such termination will be effective: ---------- [Here insert either "immediately upon your receipt of this Notice" or "on ----------, 19--," (inserting the date) or "as soon as you have delivered under the contract the following number of each of the items listed below, including those heretofore delivered, to wit: ----" or, "on ----------, 19--, on which date you are hereby directed to reduce the total number of items to be delivered under the contract as follows": (here insert instructions as to reduced deliveries.)]

2. *Cessation of work and notification to your immediate subcontractors.* (a) You shall stop all work, make no further shipments, and place no further orders in connection with the contract, except (1) to the extent necessary to perform any portion thereof not terminated by this Notice, or (2) to the extent that you may wish to retain and continue any work in process or other materials for your own account, or (3) to the extent the Contracting Officer authorizes you to continue work-in-process for reasons of safety, or to clear [or avoid damage to] equipment or to avoid immediate complete spoilage of work-in-process having a definite commercial value, or otherwise to prevent undue loss to the Government. [If you believe the authorization referred to in subparagraph (3) above is necessary or advisable, you shall immediately notify the Contracting Officer by telephone or personal conference and obtain instructions.] You shall keep adequate records of your compliance with this paragraph 2 (a) showing (i) the date you received your Notice of Termination, (ii) the effective date of such termination, and (iii) the extent of completion of performance on such effective date.

(b) You shall give notice of termination to each of your immediate subcontractors (including suppliers) who will be affected by the termination of your contract. In such notice you shall (1) give him the number of your contract with the Government, (2) state that it has been terminated (or terminated in part, if that is the case) for the convenience of the Government, (3) give him the name and address of the Contracting Officer, (4) instruct him to stop all work, to make no further shipments, to place no more orders, and to terminate all subcontracts under this contract with you (subject to the same exceptions stated in paragraph 2 (a)), (5) direct him to submit his settlement proposal promptly in order to expedite settlement, and (6) request him to give similar notice and instructions to his immediate subcontractors.

(c) You shall notify the Contracting Officer of the number of articles completed under the contract and still on hand, and arrange with him for their delivery or other disposal.

(d) You shall forthwith transfer title to and deliver to the Government, in accordance with any instructions of the Contracting Officer, all items of termination inventory (including subcontractor termination inventory which under the terms of the subcontract or purchase order concerned you have the right to take over) of the following types or classes: [insert proper identification or "none".]

(e) You shall notify the Contracting Officer of any pending legal proceedings which relate to any subcontracts or purchase orders under the terminated contract or which have resulted in or which are intended to result in a lien or encumbrance on any termination inventory other than termination inventory you propose and are authorized to purchase, retain, or dispose of. (The Contracting Officer shall also be promptly notified of any such proceedings brought after receipt of this Notice.)

(f) You shall take such other action as may be required by the Contracting Officer or under the termination clause contained in your contract.

(3) *Termination inventory.* In connection with settlement of your claim, it will be necessary to establish that all your termination inventory and that of your subcontractors has been properly accounted for. For detailed information, see 32 CFR Part 8, Subpart F.

4. *Completed end items.* Subject to 32 CFR 8.306, you will invoice acceptable completed end items under the contract in the usual way and not include them in your settlement proposal.

5. *Submission of settlement proposal.* To assist you in prompt submission of your settlement proposal, there is enclosed one set of the standard forms.

6. *Patents.* Your attention is called to any provisions of the contract which may require you to make a disclosure of, and to deliver to the Government instruments of license or assignment respecting all inventions, discoveries, and patent applications made by you in the performance of the contract. You are urged to forward such disclosures and instruments of license or assignment to the Contracting Officer promptly, inasmuch as these contractual obligations must be complied with before execution of the final settlement agreement. This paragraph may be disregarded if the contract contains no such patent provisions.

7. *Settlements with subcontractors.* You remain liable to your subcontractors and suppliers for claims arising by reason of the termination of their subcontracts or orders. You are requested to settle such termination claims as promptly as possible. For

purposes of reimbursement by the Government, such settlements will be governed by the provisions of 32 CFR Part 8.

8. The Office named below will be in charge of the settlement of your claim. As to any matters not covered by this Notice, you should consult the Office named below.

9. Please acknowledge receipt of this Notice as shown below.

(Contracting officer)

(Name of office)

(Address)

Enclosures.

Acknowledgment of Notice

The undersigned hereby acknowledges receipt of a signed copy of the foregoing Notice on ----------, 19--. Two copies of this Notice, both signed, are herewith returned.

(Name of contractor)

By ----------

(Title)

§ 8.802 Forms [1] for settlement of fixed-price contracts.

The forms set forth below are prescribed for use in settling terminated fixed-price contracts.

§ 8.802–1 DD Form 540—Settlement Proposal—Inventory Basis.

§ 8.802–2 DD Form 541—Settlement Proposal—Total Cost Basis.

§ 8.802–3 DD Form 831—Settlement Proposal—Short Form.

NOTE: In order to facilitate more expeditious settlement of small termination claims, the short form settlement proposal (DD Form 831) was revised, increasing the limitation on its use from $1,000 to $2,500, 25 F. R. 1786, Mar. 1, 1960.

§ 8.802–4 DD Form 542—Inventory Schedule A—Metals in Mill Product Form. DD Form 542c—Inventory Schedule A—Continuation Sheet.

§ 8.802–5 DD Form 543—Inventory Schedule B—Raw Materials. DD Form 543c—Inventory Schedule B—Continuation Sheet.

§ 8.802–6 DD Form 544—Inventory Schedule C—Work in Process. DD Form 544c—Inventory Schedule C—Continuation Sheet.

§ 8.802–7 DD Form 545—Inventory Schedule D—Dies, Jigs, Fixtures, etc. and Special Tools. DD Form 545c—Inventory Schedule D—Continuation Sheet.

§ 8.802–8 DD Form 832—Inventory Schedule E—Short Form for Use with DD Form 831 only.

§ 8.802–9 DD Form 546—Schedule of Accounting Information.

§ 8.802–10 DD Form 548—Application for Partial Payment.

§ 8.803 DD Form 547—Settlement Proposal for Cost-Reimbursement Type Contracts.

§ 8.804 DD Form 547s—Notice of Audit Status Date.

§ 8.805 Scrap warranty.

A warranty in the general format set forth below shall be executed by a purchaser of material as scrap (on direct purchase from the Government or on subsequent resale) in accordance with the requirements of § 8.504.

SCRAP WARRANTY (JAN. 1952)

In consideration of the transfer to the undersigned of the property covered by this Agreement at a value based upon its being used as scrap, the undersigned represents and warrants to the United States as follows:

(1) The property covered by this Agreement will be used only as scrap, either in its existing condition or after further preparation, unless and until the undersigned is released from this warranty.

(2) In the event the undersigned is released from this warranty, any payment agreed on as consideration for such release shall be made to the United States, regardless of whether this warranty shall have been executed at the request of the United States.

(3) In the event the undersigned sells the property covered by this Agreement prior to release of this warranty, the undersigned will obtain from the purchaser and tender to the United States a warranty identical to this executed by the purchaser, and upon receipt of such other warranty, this warranty will be released by the United States.

(4) All obligations of the undersigned under this warranty shall expire five years from the date hereof.

(Name)

(Address)

(Date)

§ 8.806 Forms of settlement agreement.

(See § 8.209.)

§ 8.806–1 Settlement agreement for use in settling fixed-price prime contracts after complete termination. (Sept. 1958)

This Supplemental Agreement of Settlement, entered into this------day of--------, 19-- between the United States of America (hereinafter called "The Government") represented by the Contracting Officer executing this contract, and ----------

(i) A corporation organized and existing under the Laws of the State of ----------;

(ii) A partnership consisting of----------;

(iii) An individual doing business as ----------

(hereinafter called "the Contractor").

Witnesseth that:

Whereas, the Contractor and the Government have entered into Contract No.------ under date of ----------, 19-- which, together with any and all amendments, changes, modifications, and supplements thereto, is hereinafter referred to as "the contract"; and

Whereas, the Termination for Convenience of the Government clause of the contract provides that the performance of work under the contract may at the convenience of the Government be terminated by the Government in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government, and that the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid to the Contractor by reason of such termination; and

Whereas, by notice of termination dated ---------- the Government advised the Contractor of the complete termination of the contract for the convenience of the Government; and

Whereas, as used herein the following terms shall have the meanings hereinafter set forth:

The term "termination inventory" means any items of physical property purchased, supplied, manufactured, furnished, or otherwise acquired for performance of the contract which are properly allocable to the terminated portion of the contract, but shall not include any facilities, materials, production or other equipment, or special tooling, which are subject to a separate contract or a special contract provision governing the use or disposition thereof. Termination inventory may include Government-furnished property and contractor-acquired property, as defined below.

(i) Government-furnished property is property in the possession of or acquired directly by the Government, and delivered or otherwise made available to the Contractor.

(ii) Contractor-acquired property is property procured or otherwise provided by the Contractor for the performance of a contract, whether or not the Government has title by the terms of the contract, or exercises its contractual right to take title.

The term "subcontract" means any contract as defined in 32 CFR 1.201–4 other than a prime contract, entered into by a prime contractor or a subcontractor, calling for supplies or services required for the performance of any one or more prime contracts.

The term "scrap" means property that has no reasonable prospect of being sold except for the recovery value of its basic material content.

Now, therefore, the parties hereto do mutually agree as follows:

ARTICLE 1. The Contractor certifies that all contract termination inventory (including scrap) has been retained or otherwise acquired by it, sold to third parties, returned to suppliers, stored for the Government, delivered to the Government, otherwise properly accounted for, and all proceeds or retention prices thereof, if any, have been taken into account in arriving at this agreement.

ART. 2. a. The Contractor certifies that, prior to the execution of this agreement, each of the Contractor's immediate subcontractors whose claim is included in the claim settled by this agreement has furnished to the Contractor a certificate stating (i) that all of its subcontract termination inventory (including scrap) has been retained or otherwise acquired by it, sold to third parties, returned to suppliers, stored for the Government, delivered to the Government, or otherwise properly accounted for, and all proceeds or retention prices thereof, if any, were taken into account in arriving at the settlement of the subcontract or subcontracts, and (ii) that the subcontractor has received from each of the immediate subcontractors whose claim was included in its claim for a substantially similar certificate.

b. The Contractor hereby transfers and conveys to the Government all the right, title, and interest, if any, which the Contractor has received, or is entitled to receive, in and to subcontract termination inventory, if any, not otherwise properly accounted for, and hereby assigns to the Government any and all of its rights relating thereto.

ART. 3. The Contractor certifies that, with respect to all items of termination inventory the costs of which were taken into account in arriving at the amount of this settlement, or in the settlement of any subcontract claim included in this settlement: (i) all such items are properly allocable to the terminated portion of the contract; (ii) such items are not in excess of the reasonable quantitative requirements of the terminated portion of the contract; (iii) such items do not include any items reasonably usable without loss to the Contractor, on its other work; and (iv) the Contractor has informed the Contracting Officer of any substantial

[1] A facsimile of each of the forms listed below have been filed with the Federal Register Division; copies of forms may be obtained through the Contracting Officer in any of the military departments.

change in the status of such items between the dates of its termination inventory schedules and the date of this agreement.

ART. 4. In all cases where the Contractor has not previously made such payments, the Contractor shall, within ten (10) days after receipt of the payment provided for hereunder, pay to each of its immediate subcontractors (or to their respective assignees) the respective amounts to which they are entitled, after deducting, if the Contractor so elects, any amounts then due and payable to the Contractor by such subcontractors.

ART. 5. a. The Contractor has received the sum of $_____ on account of work and services performed, or articles delivered, under the completed portion of the contract. The Government as part of this negotiated settlement hereby confirms and acknowledges the right of the Contractor, subject to the provisions of Article 6 hereof, to retain such sum heretofore paid and agrees that such sum constitutes a portion of the total amount to which the Contractor is entitled in settlement of the Contract.

b. In addition, upon execution of this agreement the Government agrees to pay to the Contractor or its assignee, upon presentation of properly certified invoices or vouchers, the sum of $_____ [insert net amount of settlement], arrived at by deducting from the sum of $_____ [for claim submitted on inventory basis, insert gross amount of settlement; for claim submitted on total cost basis, insert gross amount of settlement less amount set forth in 5a above], (1) the amount of $_____ representing all unliquidated partial or progress payments previously made on account to the Contractor or its assignee and all unliquidated advance payments (with interest, if any, thereon), and (2) the amount of $_____ representing all applicable property disposal credits [and (3) the amount of $_____ representing all other amounts due the Government under this contract except as hereinafter provided in Article 6].* Said sum, together with all other sums heretofore paid, constitutes payment in full and complete settlement of the amount due the Contractor by reason of the complete termination of work under the contract and of all other claims and liabilities of the Contractor and the Government under the contract, except as hereinafter provided in Article 6.

ART. 6. Notwithstanding any other provision of this agreement, the following rights and liabilities of the parties under the contract are hereby reserved:

[The following list of reserved or excepted rights and liabilities is intended to cover those which should most frequently be reserved, and which should in any event be scrutinized at the time a settlement agreement is signed (see 32 CFR 8.209–2). The suggested language of the enumerated excepted items on the list may be varied in the discretion of the Contracting Officer to cover more accurately the exceptions needed in a particular case. Where greater accuracy or completeness may be achieved by a reference to the number of the contract clause or provision covering the matter in question, this method of enumerating reserved rights and liabilities may be followed. Omit any of the following which are not applicable and add any additional exceptions or reservations required.]

(1) All rights and liabilities, if any, of the parties under the Renegotiation Act of 19__ [insert reference to applicable Renegotiation Act].

(2) All rights and liabilities of the parties arising under the contract articles, if any, or otherwise which relate to reproduction rights, patent infringements, inventions, applications for patent and patents, including rights to assignments, invention reports and licenses, covenants of indemnity against patent risks and bonds for patent indemnity obligations, together with all rights and liabilities under any such bond.

(3) All rights of the Government to take the benefit of any adjustments of royalties under the Royalty Adjustment Act of 1942 (35 U. S. C. 89–96) and to take the benefit of agreements reducing or otherwise affecting royalties paid or payable in connection with the performance of the contract.

(4) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, covenants of indemnity.

(5) All rights and liabilities of the parties under agreements with respect to the future care and disposition by the Contractor of Government-owned property remaining in its custody.

(6) All rights and liabilities of the parties under the contract with respect to any contract termination inventory stored for the Government pursuant to Article 1 hereof.

(7) All rights and liabilities of the parties under the contract with respect to any and all Government property furnished to the Contractor for the performance of this contract.

(8) All rights and liabilities of the parties arising under the contract, or otherwise, concerning defects in, or guarantees or warranties relating to, any articles or component parts furnished to the Government by the Contractor pursuant to the contract or this agreement.

(9) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including without limitation, any applicable clauses relating to the following topics: labor law, contingent fees, domestic articles, employment of aliens, "officials not to benefit." [If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.]

In witness whereof, etc.

*To be inserted where appropriate.

§ 8.806–2 Settlement agreement for use in settling fixed-price prime contracts after partial termination. (Sept. 1958)

This Supplemental Agreement of Settlement, entered into this _____ day of _____, 19__ between the United States of America (hereinafter called "the Government") represented by the Contracting Officer executing this contract, and _____

(i) A corporation organized and existing under the Laws of the State of _____;

(ii) A partnership consisting of _____;

(iii) An individual doing business as _____;

(hereinafter called "the Contractor").

Witnesseth that:

Whereas, the Contractor and the Government have entered into Contract No. _____ under date of _____, 19__ which, together with any and all amendments, changes, modifications, and supplements thereto, is hereinafter referred to as "the contract"; and

Whereas, the Termination for Convenience of the Government clause of the contract provides that the performance of work under the contract may at the convenience of the Government be terminated by the Government in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government, and that the Contractor and Contracting Officer may agree upon the whole or any part of the amount to be paid to the Contractor by reason of such termination; and

Whereas, by notice of termination dated _____ the Government advised the Contractor of the partial termination of the contract for the convenience of the Government as of the date and to the extent provided in such Notice, to which reference is hereby made as to the part terminated, and said part is hereinafter referred to as the "terminated portion of the contract"; and

Whereas, as used herein, the following terms shall have the meanings hereinafter set forth:

The term "termination inventory" means any items of physical property purchased, supplied, manufactured, furnished, or otherwise acquired for performance of the contract which are properly allocable to the terminated portion of the contract, but shall not include any facilities, materials, production or other equipment, or special tooling, which are subject to a separate contract or a special contract provision governing the use or disposition thereof. Termination inventory may include Government-furnished property and contractor-acquired property as defined below.

(i) Government-furnished property is property in the possession of or acquired directly by the Government, and delivered or otherwise made available to the Contractor.

(ii) Contractor-acquired property is property procured or otherwise provided by the Contractor for the performance of a contract, whether or not the Government has title by the terms of the contract, or exercises its contractual right to take title.

The term "subcontract" means any contract as defined in 32 CFR 1.201–4 other than a prime contract, entered into by a prime contractor or a subcontractor, calling for supplies or services required for the performance of any one or more prime contracts.

The term "scrap" means property that has no reasonable prospect of being sold except for the recovery value of its basic material content.

Now, therefore, the parties hereto do mutually agree as follows:

ARTICLE 1. The terminated portion of the contract is designated as follows: (specify the terminated portion clearly as to items, including (i) item numbers, (ii) descriptions, (iii) quantity terminated, (iv) unit price of items, (v) total price of terminated items, and (vi) any other explanation necessary to avoid uncertainty or misunderstanding.)

ART. 2. The Contractor certifies that all contract termination inventory (including scrap) has been retained or otherwise acquired by it, sold to third parties, returned to suppliers, stored for the Government, delivered to the Government, or otherwise properly accounted for, and all proceeds or retention prices thereof, if any, have been taken into account in arriving at this agreement.

ART. 3. a. The Contractor certifies that, prior to the execution of this agreement, each of the contractor's immediate subcontractors whose claim is included in the claim settled by this agreement has furnished to the Contractor a certificate stating (i) that all its subcontract termination inventory (including scrap) has been retained or otherwise acquired by it, sold to third parties, returned to suppliers, stored for the Government, delivered to the Government, or otherwise properly accounted for, and all proceeds or retention prices thereof, if any, were taken into account in arriving at the settlement of the subcontract or subcontracts and (ii) that the subcontractor has received from each of the immediate subcontractors whose claim was included in its claim a substantially similar certificate.

b. The Contractor hereby transfers and conveys to the Government all the right, title and interest, if any, which the Contractor has received, or is entitled to receive, in and to subcontract termination inventory,

if any, not otherwise properly accounted for, and hereby assigns to the Government any and all of its rights relating thereto.

ART. 4. The Contractor certifies that, with respect to all items of termination inventory the costs of which were taken into account in arriving at the amount of this settlement, or in the settlement of any subcontract claim included in this settlement: (i) all such items are properly allocable to the terminated portion of the contract; (ii) such items are not in excess of the reasonable quantitative requirements of the terminated portion of the contract; (iii) such items do not include any items reasonably usable, without loss to the Contractor, on its other work; and (iv) the Contractor has informed the Contracting Officer of any substantial change in the status of such items between the dates of its termination inventory schedules and the date of this agreement.

ART. 5. In all cases where the Contractor has not previously made such payments, the Contractor shall, within ten (10) days after receipt of the payment provided for hereunder, pay to each of its immediate subcontractors (or to their respective assignees) the respective amounts to which they are entitled, after deducting, if the Contractor so elects, any amounts then due and payable to the Contractor by such subcontractors.

ART. 6. Upon execution of this agreement, the Government agrees to pay to the Contractor or its assignee, upon presentation of properly certified invoices or vouchers, the sum of $_____ [insert net amount of settlement], arrived at by deducting from the sum of $_____ [insert gross amount of settlement], (1) the amount of $_____ representing all unliquidated partial or progress payments previously made on account to the Contractor or its assignee and all unliquidated advance payments (with interest, if any, thereon) applicable to the terminated portion of the contract and (2) the amount of $_____ representing all applicable property disposal credits. Said sum, together with all other sums heretofore paid, constitutes payment in full and complete settlement of the amount due the Contractor with respect to the terminated portion of the contract, except as hereinafter provided in Article 7.

ART. 7. Upon payment of said sum of $_____ [insert net amount of settlement], all obligations of the Contractor to perform further work or services or to make further deliveries under the terminated portion of the contract and all obligations of the Government to make further payments or to carry out other undertakings in connection therewith shall cease: *Provided, however,* That nothing herein contained shall impair or affect in any way any covenants, terms or conditions of the contract relating to the completed or continued portion thereof: *And provided further,* That, with respect to the terminated portion of the contract, the following rights and liabilities of the parties are reserved.

[The following list of reserved or excepted rights and liabilities relating to the terminated portion of the contract is intended to cover those which should most frequently be reserved, and which should in any event be scrutinized at the time a settlement agreement is signed (see 32 CFR 8.209–2). The suggested language of the enumerated excepted items on the list may be varied in the discretion of the Contracting Officer to cover more accurately the exceptions needed in a particular case. Where greater accuracy or completeness may be achieved by a reference to the number of the contract clause or provision covering the matter in question, this method of enumerating reserved rights and liabilities may be followed. Omit any of the following which are not applicable and add any additional exceptions or reservations required.]

(1) All rights and liabilities, if any, of the parties under the Renegotiation Act of 19__ [insert reference to applicable Renegotiation Act].

(2) All rights of the Government to take the benefit of any adjustments of royalties under the Royalty Adjustment Act of 1942 (35 U. S. C. 89–96) and to take the benefit of agreements reducing or otherwise affecting royalties paid or payable in connection with the performance of the contract.

(3) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to the following topics: labor law, contingent fees, domestic articles, employment of aliens, "officials not to benefit." [If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.]

(4) All rights and liabilities of the parties arising under the contract articles, if any, or otherwise which relate to reproduction rights, patent infringements, inventions, applications for patent and patents, including rights to assignments, invention reports and licenses, covenants of indemnity against patent risks and bonds for patent indemnity obligations, together with all rights and liabilities under any such bond.

(5) All rights and liabilities of the parties arising under the contract, or otherwise, concerning defects in, or guarantees or warranties relating to, any articles or component parts furnished to the Government by the Contractor pursuant to the contract or this agreement.

(6) All rights and liabilities of the parties with respect to any contract termination inventory stored for the Government pursuant to Article 2 hereof.

In witness whereof, etc.

§ 8.806–3 Partial settlement agreement, for use in settling fixed-price prime contracts after complete or partial termination where settlement pertains only to settlements with subcontractors. (Sept. 1958)

This supplemental agreement of settlement, entered into this _____ day of _____, 19__ between the United States of America (hereinafter called "the Government") represented by the Contracting Officer executing this contract, and_____

(i) A corporation organized and existing under the Laws of the State of_____;

(ii) A partnership consisting of_____;

(iii) An individual doing business as _____;

(hereinafter called "the Contractor").

Witnesseth that:

Whereas, the Contractor and the Government have entered into Contract No. _____ under date of _____, 19__ which, together with any and all amendments, changes, modifications, and supplements thereto, is hereinafter referred to as "the contract"; and

Whereas, the Termination for Convenience of the Government clause of the contract provides that the performance of work under the contract may at the convenience of the Government be terminated by the Government in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government, and that the Contractor and Contracting Officer may agree upon the whole or any part of the amount to be paid to the Contractor by reason of such termination; and

Whereas, by notice of termination dated _____ the Government advised the Contractor of the [complete termination of the contract for the convenience of the Government;] * [partial termination of the contract for the convenience of the Government as of the date and to the extent provided in such Notice, to which reference is hereby made as to the part terminated, and said part is hereinafter referred to as "the terminated portion of the contract";] * and

Whereas, the Contractor, in connection with the performance of the contract, has entered into the following subcontracts [among others]: ** [insert here a list of the terminated subcontracts included in this settlement], which subcontracts were terminated by the Contractor in accordance with the termination for convenience clause of the contract and in accordance with the Notice of Termination received by it from the Government; and

Whereas, the parties desire to settle that portion of the termination claim of the Contractor which is based upon the termination of the subcontracts listed herein; and

Whereas, as used herein, the following terms shall have the meanings hereinafter set forth:

The term "termination inventory" means any items of physical property purchased, supplied, manufactured, furnished, or otherwise acquired for performance of the contract which are properly allocable to the terminated portion of the contract, but shall not include any facilities, materials, production or other equipment, or special tool—which are subject to a separate contract or a special contract provision governing the use or disposition thereof. Termination inventory may include Government-furnished property and contractor-acquired property as defined below.

(i) Government-furnished property is property in the possession of or acquired directly by the Government, and delivered or otherwise made available to the Contractor.

(ii) Contractor-acquired property is property procured or otherwise provided by the Contractor for the performance of a contract, whether or not the Government has title by the terms of the contract, or exercises its contractual right to take title.

The term "subcontract" means any contract as defined in 32 CFR 1.201–4 other than a prime contract, entered into by a prime contractor or a subcontractor, calling for supplies or services required for the performance of any one or more prime contracts.

The term "scrap" means property that has no reasonable prospect of being sold except for the recovery value of its basic material content.

Now, therefore, the parties hereto do mutually agree as follows:

ARTICLE 1. a. The Contractor certifies that, prior to the execution of this agreement, each of the Contractor's immediate subcontractors whose claim is included in the claim settled by this agreement has furnished to the Contractor a certificate stating (i) that all its subcontract termination inventory (including scrap), has been retained or otherwise acquired by it, sold to third parties, returned to suppliers, stored for the Government, delivered to the Government, or otherwise properly accounted for, and all proceeds or retention prices thereof, if any, were taken into account in arriving at the settlement of the subcontract or subcontracts and (ii) that the subcontractor has received from each of the immediate subcontractors whose claim was included in its claim a substantially similar certificate.

b. The Contractor hereby transfers and conveys to the Government all the right, title and interest, if any, which the Contractor has received, or is entitled to receive, in and to such subcontract termination in-

*Insert appropriate phrase.
**Insert where appropriate.

ventory, to the extent that it is not otherwise properly accounted for, and hereby assigns to the Government any and all of its rights relating thereto.

ART. 2. In all cases where the Contractor has not previously made such payments, the Contractor shall, within ten (10) days after receipt of the payment provided for hereunder, pay to each of its immediate subcontractors (or to their respective assignees) the respective amounts to which they are entitled, after deducting, if the Contractor so elects, any amounts then due and payable to the Contractor by such subcontractors.

ART. 3. The Contractor certifies that, with respect to all items of subcontract termination inventory the costs of which were taken into account in arriving at the amount of this settlement, or in the settlement of any subcontract claim included in this settlement: (i) All such items are properly allocable to the terminated portion of the contract; (ii) such items are not in excess of the reasonable quantitative requirements of the terminated portion of the contract; (iii) such items do not include any items reasonably usable, without loss to the Contractor, on its other work; and (iv) the Contractor has informed the Contracting Officer of any substantial change in the status of such items between the dates of its termination inventory schedules and the date of this agreement.

ART. 4. Upon execution of this agreement the Government agrees to pay to the Contractor or its assignee, upon presentation of properly certified invoices of vouchers, the sum of $------, which sum, [together with the amount of $------ heretofore paid the Contractor as partial, progress, or advance payments],* constitutes payment in full and complete settlement, except as hereinafter provided in Article 5, of the amount due the Contractor with respect to that portion of its termination claim which is based upon termination of the subcontracts listed hereinabove. [The first sum to be inserted above should be the net amount of this partial settlement, arrived at by deducting from the gross amount of settlements with subject subcontractors as approved by the Contracting Officer; the second amount to be inserted above, which is that portion of partial, progress, or advance payments liquidated by this agreement.]

ART. 5. Notwithstanding any other provision of this agreement, the following rights and liabilities of the parties under the contract are hereby reserved:

[Insert here a list of the reserved or excepted rights and liabilities of the Government and the Contractor (see 32 CFR 8.209–2). Reference is made to instructions set forth in Article 6 of the agreement set forth in 32 CFR 8.806–1 and Article 7 of the agreement set forth in 32 CFR 8.806–2, and to the reserved or excepted rights and liabilities set forth in those articles, which may be used as appropriately modified to meet the requirements of any given settlement hereunder.]

In witness whereof, etc.

*Insert appropriate phrase.

§ 8.806–4 Settlement agreement for use in settling cost-reimbursement type prime contracts after complete termination where settlement includes costs. (Sept. 1958)

This Supplemental Agreement of Settlement, entered into this ------ day of ----------, 19-- between the United States of America (hereinafter called "the Government") represented by the Contracting Officer executing this contract, and ----------

(i) A corporation organized and existing under the Laws of the State of ----------;
(ii) A partnership consisting of ----------;
(iii) An individual doing business as ----------;

(hereinafter called "the Contractor").

Witnesseth that:

Whereas, the Contractor and the Government have entered into Contract No. ------ under date of ----------, 19-- which, together with any and all amendments, changes, modifications, and supplements thereto, is hereinafter referred to as "the contract"; and

Whereas, the Termination clause of the contract provides that the performance of work under the contract may at the convenience of the Government be terminated by the Government in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government, and that the Contractor and Contracting Officer may agree upon the whole or any part of the amount to be paid to the Contractor by reason of such termination; and

Whereas, by notice of termination dated ---------- the Government advised the Contractor of the complete termination of the contract for the convenience of the Government; and

Whereas, as used herein, the following terms shall have the meanings hereinafter set forth:

The term "termination inventory" means any items of physical property purchased, supplied, manufactured, furnished, or otherwise acquired for performance of the contract which are properly allocable to the terminated portion of the contract, but shall not include any facilities, materials, production or other equipment, or special tooling, which are subject to a separate contract or a special contract provision governing the use or disposition thereof. Termination inventory may include Government-furnished property and contractor-acquired property as defined below.

(i) Government-furnished property is property in the possession of or acquired directly by the Government, and delivered or otherwise made available to the Contractor.

(ii) Contractor-acquired property is property procured or otherwise provided by the Contractor for the performance of a contract, whether or not the Government has title by the terms of the contract, or exercises its contractual right to take title.

The term "subcontract" means any contract as defined in 32 CFR 1.201–4 other than a prime contract, entered into by a prime contractor or a subcontractor, calling for supplies or services required for the performance of any one or more prime contracts.

The term "scrap" means property that has no reasonable prospect of being sold except for the recovery value of its basic material content.

Now therefore, the parties hereto do mutually agree as follows:

ARTICLE 1. The Contractor certifies that all contract termination inventory (including scrap) has been retained or otherwise acquired by it, sold to third parties, returned to suppliers, stored for the Government, delivered to the Government, or otherwise properly accounted for, and all proceeds or retention prices thereof, if any, have been taken into account in arriving at this agreement.

ART. 2. a. The Contractor certifies that, prior to the execution of this agreement, each of the Contractor's immediate subcontractors whose claim is included in the claim settled by this agreement has furnished to the Contractor a certificate stating (i) that all of its subcontract termination inventory (including scrap) has been retained or otherwise acquired by it, sold to third parties, returned to suppliers, stored for the Government, delivered to the Government, or otherwise properly accounted for, and all proceeds or retention prices thereof, if any, were taken into account in arriving at the settlement of the subcontract or subcontracts and (ii) that the subcontractor has received from each of the immediate subcontractors whose claim was included in its claim a substantially similar certificate.

b. The Contractor hereby transfers and conveys to the Government all the right, title and interest, if any, which the Contractor has received, or is entitled to receive, in and to subcontract termination inventory, if any, not otherwise properly accounted for, and hereby assigns to the Government any and all of its rights relating thereto.

ART. 3. The Contractor certifies that, with respect to all items of termination inventory the costs of which were taken into account in arriving at the amount of this settlement, or in the settlement of any subcontract claim included in this settlement: (i) all such items are properly allocable to the terminated portion of the contract; (ii) such items are not in excess of the reasonable quantitative requirements of the terminated portion of the contract; (iii) such terms do not include any items reasonably usable, without loss to the Contractor, on its other work; and (iv) the Contractor has informed the Contracting Officer of any substantial change in the status of such items between the dates of its termination inventory schedules and the date of this agreement.

ART. 4. In all cases where the Contractor has not previously made such payments, the Contractor shall, within ten (10) days after receipt of the payment provided for hereunder, pay to each of its immediate subcontractors (or to their respective assignees) the respective amounts to which they are entitled, after deducting, if the Contractor so elects, any amounts then due and payable to the Contractor by such subcontractors.

ART. 5. a. The Contractor has received the sum of $------ on account of work and services performed, or articles delivered, under the contract prior to the effective date of termination. The Government as part of this negotiated settlement hereby confirms and acknowledges the right of the Contractor, subject to the provisions of Article 6 hereof, to retain such sum heretofore paid and agrees that such sum constitutes a portion of the total amount to which the Contractor is entitled in complete and final settlement of the contract.

b. In addition, upon execution of this agreement the Government agrees to pay to the Contractor or its assignee, upon presentation of properly certified invoices or vouchers, the sum of $------ [insert net amount of settlement], arrived at by deducting from the sum of $------ [insert net amount of settlement less amount set forth in Article 5a above], (1) the amount of $------ representing all unliquidated partial or progress payments previously made on account to the Contractor or its assignee and all unliquidated advance payments (with interest, if any, thereon) and (2) the amount of $------ representing all applicable property disposal credits [and (3) the amount of $------ representing all other amounts due the Government under this contract except as hereinafter provided in Article 6].* Said sum, together with all other sums heretofore paid, constitutes payment in full and complete settlement of the amount due the Contractor by reason of the complete termination of work under the contract and of all other claims and liabilities of the Contractor and the Government under the contract, except as hereinafter provided in Article 6.

ART. 6. Notwithstanding any other provision of this agreement the following rights and liabilities of the parties under the contract are hereby reserved:

[The following list of reserved or excepted rights and liabilities is intended to cover those which should most frequently be reserved, and which should in any event be

*To be inserted where appropriate.

scrutinized at the time a settlement agreement is signed (see 32 CFR 8.209–2). The suggested language of the enumerated excepted items on the list may be varied in the discretion of the Contracting Officer to cover more accurately the exceptions needed in a particular case. Where greater accuracy or completeness may be achieved by a reference to the number of the contract clause or provision covering the matter in question, this method of enumerating reserved rights and liabilities may be followed. Omit any of the following rights which are not applicable and add any additional exceptions or reservations required.]

(1) Claims by the Contractor against the Government for items of cost which are the subject of General Accounting Office exceptions (or other items of cost of the same nature), which are excluded from the settlement without prejudice to the rights of either party, as follows: [Insert the amounts and describe the claims not waived by Contractor.]

(2) Claims by the Contractor against the Government, as to which his right of reimbursement is disputed, which are excluded without prejudice to the rights of either party as follows: [Insert the amounts and describe the claims with respect to which findings have been made by the Contracting Officer disallowing the item and with respect to which the Contractor has taken, or intends to take, timely appeal.]

(3) Claims by the Contractor against the Government which are unknown in amount and which involve costs claimed to be reimbursable under the contract, as follows: [Insert the estimated amounts and describe the claims.]

(4) Claims by the Contractor against the Government whose existence is unknown, based upon responsibility of the Contractor to third parties and which involve costs reimbursable under the contract.

(5) Claims by the Government against the Contractor which are based upon refunds, rebates, credits, or other accounts not now known to the Government, together with interest thereon, now due or which may become due the Contractor from third parties to the extent that such amounts arise out of transactions for which reimbursement has been made to the Contractor under the contract. Any such amounts which may hereafter become due to the Contractor from any third party or other source shall be paid to the Government within 30 days after receipt by the Contractor. Interest at 6 percent per annum shall accrue and shall be paid to the Government on any such accounts as remain unpaid after the 30-day period.

(6) All rights and liabilities, if any, of the parties under the Renegotiation Act of 19__. [Insert reference to applicable Renegotiation Act.]

(7) All rights and liabilities of the parties arising under the contract articles, if any, or otherwise which relate to reproduction rights, patent infringements, inventions, applications for patent and patents, including rights to assignments, invention reports and licenses, covenants of indemnity against patent risks and bonds for patent indemnity obligations, together with all rights and liabilities under any such bond.

(8) All rights of the Government to take the benefit of any adjustments of royalties under the Royalty Adjustment Act of 1942 (35 U. S. C. 89–96) and to take the benefit of agreements reducing or otherwise affecting royalties paid or payable in connection with the performance of the contract.

(9) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, covenants of indemnity.

(10) All rights and liabilities of the parties under agreements with respect to the future care and disposition by the Contractor of Government-owned property remaining in its custody.

(11) All rights and liabilities of the parties under the contract with respect to any contract termination inventory stored for the Government pursuant to Article 1 hereof.

(12) All rights and liabilities of the parties under the contract with respect to any and all Government property, furnished to or acquired by the Contractor for the performance of this contract.

(13) All rights and liabilities of the parties arising under the contract, or otherwise, concerning defects in, or guarantees or warranties relating to, any articles or component parts furnished to the Government by the Contractor pursuant to the contract or this agreement.

(14) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to the following topics: labor law, contingent fees, domestic articles, employment of aliens, "officials not to benefit." [If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.]

In witness whereof, etc.

§ 8.806–5 Settlement agreement for use in settling cost-reimbursement type prime contracts after complete termination where settlement is limited to fee. (Sept. 1958)

This Supplemental Agreement of Settlement, entered into this ------ day of ----------, 19__ between the United States of America (hereinafter called "the Government") represented by the Contracting Officer executing this contract, and ----------

(i) A corporation organized and existing under the Laws of the State of ----------;

(ii) A partnership consisting of ----------

(iii) An individual doing business as ----------;

(hereinafter called "the Contractor").

Witnesseth that:

Whereas, the Contractor and the Government have entered into Contract No. ------ under date of ----------, 19__ which, together with any and all amendments, changes, modifications, and supplements thereto, is hereinafter referred to as "the contract"; and

Whereas, the Termination clause of the contract provides that the performance of work under the contract may at the convenience of the Government be terminated by the Government in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government, and that the Contractor and Contracting Officer may agree upon the whole or any part of the amount to be paid to the Contractor by reason of such termination; and

Whereas, by notice of termination dated ---------- the Government advised the Contractor of the complete termination of the contract for the convenience of the Government; and

Whereas, settlement of said terminated contract has been limited to adjustment of the fee.

Now, therefore, the parties hereto do mutually agree as follows:

ARTICLE 1. a. The Contractor has received the sum of $------ on account of its fee under the contract prior to the effective date of termination.

b. In addition, upon execution of this agreement, the Government agrees to pay to the Contractor or its assignee, upon presentation of properly certified invoices or vouchers, the sum of $------ [insert net amount to be paid on account of fee]. Said sum, together with all other sums heretofore paid on account of fee, constitutes payment in full and complete settlement of the amount due the Contractor on account of its fee under the contract.

ART. 2. The Contractor's allowable costs under the contract will continue to be reimbursed on Standard Form 1034 cost vouchers in accordance with the applicable provisions of the contract and of 32 CFR Part 8.

ART. 3. Notwithstanding any other provision of this agreement the following rights and liabilities of the parties under the contract are hereby reserved.

[The following list of reserved or excepted rights and liabilities is intended to cover those which most frequently be reserved, and which should in any event be scrutinized at the time a settlement agreement is signed (see 32 CFR 8.209–2). The suggested language of the enumerated excepted items on the list may be varied in the discretion of the Contracting Officer to cover more accurately the exceptions needed in a particular case. Where greater accuracy or completeness may be achieved by a reference to the number of the contract clause or provision covering the matter in question, this method of enumerating reserved rights and liabilities may be followed. Omit any of the following which are not applicable and add any additional exceptions or reservations required.]

(1) All rights and liabilities, if any, of the parties under the Renegotiation Act of 19__ [insert reference to applicable Renegotiation Act].

(2) All rights and liabilities of the parties arising under the contract articles, if any, or otherwise which relate to reproduction rights, patent infringement, inventions, applications for patent and patents, including rights to assignments, invention reports and licenses, covenants of indemnity against patent risks and bonds for patent indemnity obligations, together with all rights and liabilities under any such bond.

(3) All rights of the Government to take the benefit of any adjustments of royalties under the Royalty Adjustment Act of 1942 (35 U. S. C. 89–96) and to take the benefit of agreements reducing or otherwise affecting royalties paid or payable in connection with performance of the contract.

(4) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), convenants not to compete, covenants of indemnity.

(5) All rights and liabilities of the parties under agreements with respect to the future care and disposition by the Contractor of Government-owned property remaining in its custody.

(6) All rights and liabilities of the parties under the contract with respect to any and all Government property, furnished to or acquired by the Contractor for the performance of this contract.

(7) All rights and liabilities of the parties arising under the contract, or otherwise, concerning defects in, or guaranties or warranties relating to, any articles or component parts furnished to the Government by the Contractor pursuant to the contract or this agreement.

(8) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to the following topics: labor law, contingent fees, domestic articles, employment of aliens, "officials not to benefit." [If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.]

In witness whereof, etc.

§ 8.806–6 No cost settlement agreement partial termination. (Sept. 1958)

This Supplemental Agreement of Settlement, entered into this _____ day of _____, 19__, between the United States of America (hereinafter called "the Government"), represented by the Contracting Officer executing this contract, and _____

(i) A corporation organized and existing under the Laws of the State of _____;

(ii) A partnership consisting of _____;

(iii) An individual doing business as _____;

(hereinafter called "the Contractor").

Witnesseth that:

Whereas, the Contractor and the Government have entered into Contract No. _____ under date of _____, 19__ which, together with any and all amendments, changes, modifications, and supplements thereto, is hereinafter referred to as "the contract"; and

Whereas, the contract provides that the performance of work thereunder may at the convenience of option of the Government be terminated by the Government in whole, or from time to time in part, whenever any such termination is determined to be for the best interest of the Government, and that the Contractor and Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of such termination; and

Whereas, by the Notice of Termination dated _____, 19__, the Government advised the Contractor of the partial termination of the contract for the convenience or at the option of the Government as of the date and to the extent provided in such Notice, to which reference is hereby made as to the part terminated, and said part is hereinafter referred to as "the terminated portion of the contract"; and

Whereas, the Contractor is willing to waive unconditionally any claim against the Government by reason of such termination.

Now, therefore, the parties hereto agree as follows:

ARTICLE 1. The terminated portion of the contract is designated as follows: (Specify the terminated portion clearly as to items including (i) item numbers, (ii) descriptions, (iii) quantity terminated, (iv) unit price of items, (v) total price of terminated items, and (vi) any other explanation necessary to avoid uncertainty or misunderstanding.)

ART. 2. The Contractor hereby unconditionally waives any claim against the Government arising under the terminated portion of the contract or by reason of its termination including, without limitation, all obligation of the Government to make further payments or to carry out other undertakings in connection with said terminated portion, and the Government acknowledges that the Contractor has no obligation to perform further work or services or to make further deliveries of articles or materials under the terminated portion of the contract: *Provided, however,* That nothing herein contained shall impair or affect in any way any other covenants, terms or conditions of the contract. And *Provided further,* That, with respect to the terminated portion of the contract, the following rights and liabilities of the parties are reserved:

(List reserved or excepted rights and liabilities; see 32 CFR § 8.209–2 and Article 7 of the agreement set forth in 32 CFR § 8.806–2.)

In witness whereof, etc.

§ 8.806–7 No cost settlement agreement—complete termination.

This supplemental agreement of settlement, entered into this _____ day of _____, 19__, between the United States of America (hereinafter called "the Government"), represented by the Contracting Officer executing this contract, and _____

(i) A corporation organized and existing under the Laws of the State of _____;

(ii) A partnership consisting of _____;

(iii) An individual doing business as _____;

(hereinafter called "the Contractor").

Witnesseth that:

Whereas, the Contractor and the Government have entered into Contract No. _____ under date of _____, 19__, which, together with any and all amendments, changes, modifications, and supplements thereto, is hereinafter referred to as "the contract"; and

Whereas, the contract provides that the performance of work thereunder may at the convenience or option of the Government be terminated by the Government in whole, or from time to time in part, whenever any such termination is determined to be for the best interest of the Government, and that the Contractor and Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of such termination; and

Whereas, by the Notice of Termination dated _____, 19__, the Government advised the Contractor of the termination of the contract for the convenience or at the option of the Government; and

Whereas, the Contractor is willing to waive unconditionally any claim against the Government by reason of such termination;

Now, therefore, the parties hereto agree as follows:

ARTICLE 1. The Contractor hereby unconditionally waives any claim against the Government by reason of the termination of the contract and, except as set forth below, releases it from any and all obligations arising under the contract or by reason of its termination, and the Government agrees that all obligations arising under the contract or by reason of its termination, shall be deemed to be concluded; except as follows:

(List reserved or excepted rights and liabilities; see 32 CFR 8.209–2 and Article 6 of the agreement set forth in 32 CFR 8.806–1.)

In witness whereof, etc.

§ 8.807 DD Form 1114—Instructions for Use of Contract Termination Settlement and Inventory Schedule Forms.[1]

NOTE: In order to facilitate more expeditious settlement of contract terminations and inventory schedules, DD Form 1114 was revised, increasing the limitation on its use from $1,100 to $2,500, 25 F.R. 1786, Mar. 1, 1960.

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[1] A facsimile of this form has been filed with the Federal Register Division; copies of the form may be obtained through the contracting officer in any of the military departments.

PART 9—PATENTS, DATA, AND COPYRIGHTS

Sec.
9.000 Scope of part.

Subpart A—Patents

9.100 Scope of subpart.
9.101 [Reserved]
9.102 Authorization and consent.
9.102–1 Authorization and consent in contracts for supplies.
9.102–2 Authorization and consent in contracts for research or development.
9.103 Patent indemnification of Government by contractor.
9.103–1 Patent indemnification in formally advertised contracts; commercial status predetermined.
9.103–2 Patent indemnification in formally advertised contracts—commercial status not predetermined.
9.103–3 Patent indemnification in negotiated contracts.
9.103–4 Waiver of indemnity by the Government.
9.104 Notice and assistance.
9.105 Processing of infringement claims.
9.106 Classified contracts.
9.106–1 Classified contracts to be performed outside the United States.
9.107 Patent rights.
9.107–1 General.
9.107–2 License rights; domestic contracts.
9.107–3 License rights—foreign contracts.
9.107–4 Contracts relating to atomic energy.
9.107–5 Contracts relating to civil defense.
9.107–6 Patent license rights under product improvement programs or independent research programs.
9.107–7 Contracts placed for NASA.[1]
9.108 Patent rights under contracts for personal services.
9.109 Followup of patent rights.
9.110 Reporting of royalties.
9.111 Adjustment of royalties.
9.112 [Reserved]

Subpart B—Data and Copyrights

9.200 Scope of subpart.
9.201 Definitions.
9.202 Acquisition and use of data.
9.202–1 Acquisition of data.
9.202–2 Use of data.
9.202–3 Multiple sources of supplies.
9.202–4 Delivery of data for use in foreign countries.
9.202–5 Copyrights.
9.202–6 Data furnished on a restricted basis in support of a proposal.
9.203 Contract clauses; general.
9.203–1 Basic data clause.
9.203–2 Provision for addition to basic data clause for use in supply contracts.
9.203–3 Limited rights provision for addition to basic data clause.
9.203–4 Provision for addition to basic data clause for use in contracts for experimental, developmental, or research work.
9.204 Contract clauses; special.
9.204–1 Limitation on Government's right of publication for sale to the general public.
9.204–2 Production of motion pictures.
9.204–3 Histories and other works.
9.205 Contracts for acquisition of existing works.
9.205–1 Off-the-shelf purchase of books and similar items.
9.205–2 Contracts for existing motion pictures.
9.206 Contracts to be performed outside the United States.

Subpart C—Foreign License and Technical Assistance Agreements

Sec.
9.301 General.
9.301–1 Background.
9.301–2 Policy.
9.302 Foreign license and technical assistance contracts between the Government and domestic concerns.
9.303 Supply contracts between the Government and second sources.
9.304 Foreign license and technical assistance agreements between domestic concern and foreign government or concern.
9.304–1 International traffic in arms regulations.
9.304–2 Review agreements.

AUTHORITY: §§ 9.000 to 9.304–2 issued under sec. 201, 55 Stat. 839, as amended, sec. 2202, 70A Stat. 120; 50 U. S. C. App. 611, 10 U. S. C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U. S. C. 2301–2314, E. O. 9001, 6 F. R. 6787, as amended by E. O. 9296, 8 F. R. 1429, 3 CFR, 1943 Cum. Supp.

§ 9.000 Scope of part.

This part sets forth policies, instructions and contract clauses pertaining to patents and copyrights in connection with the procurement of supplies and services.

Subpart A—Patents

§ 9.100 Scope of subpart.

This subpart prescribes contract clauses and instructions which define and implement the policy of the Department of Defense with respect to—

(a) Inventions relating to experimental, developmental, or research work performed under Government contracts.

(b) Patent infringement liability resulting from work performed under Government contracts.

(c) Patent royalties payable in connection with the performance of Government contracts.

(d) Security requirements covering patent applications containing classified subject matter filed by contractors.

§ 9.101 [Reserved]

§ 9.102 Authorization and consent.

(a) Under 28 U.S. Code 1498, any suit for infringement of a patent based on the manufacture or use of a patented invention for the Government by a contractor or by a subcontractor (including lower-tier subcontractors) can be maintained only against the Government in the Court of Claims, and not against the contractor or subcontractor, in those cases where the Government has authorized or consented to the manufacture or use of the patented invention. Accordingly, in order that work by a contractor or subcontractor under a Government contract may not be enjoined by reason of patent infringement, authorization and consent may be given as herein provided. The liability of the Government for damages in any such suit against it may, however, ultimately be borne by the contractor or subcontractor in accordance with the terms of any patent indemnity clause also included in the contract, and an authorization and consent clause does not detract from any patent indemnification commitment by the contractor or subcontractor. Therefore, both a patent indemnity clause and an authorization and consent clause may be included in the same contract.

§ 9.102–1 Authorization and consent in contracts for supplies.

The contract clause set forth below may be included in all contracts for supplies (including construction work), except that it shall not be used:

(a) When prohibited by § 9.104; or

(b) In contracts exclusively for experimental, developmental, or research work which are subject to the provisions of § 9.102–2.

AUTHORIZATION AND CONSENT (JAN. 1955)

The Government hereby gives its authorization and consent (without prejudice to its rights of indemnification, if such rights are provided for in this contract) for all use and manufacture, in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract), of any patented invention (i) embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract, or (ii) utilized in the machinery, tools, or methods the use of which necessarily results from compliance by the Contractor or the using subcontractor with (a) specifications or written provisions now or hereafter forming a part of this contract, or (b) specific written instructions given by the Contracting Officer directing the manner of performance. The Contractor's entire liability to the Government for patent infringement shall be determined solely by the provisions of the indemnity clause, if any, included in the contract and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

§ 9.102–2 Authorization and consent in contracts for research or development.

Greater latitude in the use of patented inventions is to be allowed in a contract for experimental, developmental, or research work than in a contract for supplies. Unless prohibited by § 9.104, the clause set forth below shall be included in all contracts calling exclusively for experimental, developmental, or research work, and may be included in contracts calling for both supplies and experimental, developmental, or research work. If the clause set forth below is included in a contract, the clause in § 9.102–1 shall not be included.

AUTHORIZATION AND CONSENT (JAN. 1955)

The Government hereby gives its authorization and consent for all use and manufacture of any patented invention in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract).

§ 9.103 Patent indemnification of Government by contractor.

In order that the Government may be reimbursed for liability for patent infringement arising out of or resulting from the performance of construction contracts or contracts for supplies which normally are or have been sold or offered for sale to the public in the commercial open market, or which are the same as such supplies with a relatively minor modification thereof, clauses providing for indemnification of the Government are to be included in such contracts in accordance with the instructions pre-

ceding the clauses set forth below. A patent indemnity clause shall not be used in contracts under the following circumstances:

(a) Where the contract is for supplies which clearly are not or have not been sold or offered for sale to the public in the commercial open market. However, even in the foregoing instance, a patent indemnity clause may be included where (1) in the case of contracts to be awarded by formal advertising it is desired to obtain an indemnity as to components and spare parts so sold or offered for sale, in which case the clause in § 9.103–2 may be used; or (2) in the case of contracts to be awarded either by formal advertising or negotiation, a patent owner contends that the prospective procurement would infringe his patent and the low bidder or offeror is willing to indemnify the Government as to such patent without increase in price on the basis that the patent is invalid or not infringed, or for other good reasons (see § 2.407–8 of this chapter); or

(b) Where both performance and delivery are to be outside the United States, its Territories, its possessions, or Puerto Rico, unless the contract indicates that the supplies are ultimately to be shipped into the United States, its Territories, its possessions, or Puerto Rico, in which case the instructions of §§ 9.103–1, 9.103–2, or 9.103–3 are applicable; or

(c) Where the contract is for an amount of $5,000 or less, except that, as a matter of administrative convenience, the clause need not be deleted where it is a part of a standard form being used for contracts of $5,000 or less, since it is self-deleting as to such contracts.

§ 9.103–1 Patent indemnification in formally advertised contracts; commercial status predetermined.

(a) Except as prohibited by § 9.103, the clause set forth below is appropriate in formally advertised construction contracts and shall be included in formally advertised contracts for supplies when it has been determined in advance of issuing the invitation for bids that the supplies (or such supplies apart from relatively minor modifications to be made thereto) normally are or have been sold or offered for sale by any supplier to the public in the commercial open market.

PATENT INDEMNITY (PREDETERMINED) (JAN. 1955)

If the amount of this contract is in excess of $5,000, the Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States letters patent (except letters patent issued upon an application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government) arising out of the manufacture or delivery of supplies or out of construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this contract, or out of the use or disposal by or for the account of the Government of such supplies or construction work. The foregoing indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof; and further, such indemnity shall not apply if: (i) the infringement results from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor; or (ii) the infringement results from the addition to, or change in, the supplies furnished or construction work performed, which addition or change was made subsequent to delivery or performance by the Contractor; or (iii) the claimed infringement is settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

(b) Certain supply contracts call only in part for items which normally are or have been sold or offered for sale by any supplier to the public in the commercial open market, or such items with relatively minor modifications. For the purpose of excluding from patent indemnification such specific items as normally are not or have not been sold or offered for sale by any supplier to the public in the commercial open market, the following sentence may be added to the end of the clause set forth in paragraph (a) of this section:

The foregoing shall not apply to the following contract items:

(List the items to be excluded)

§ 9.103–2 Patent indemnification in formally advertised contracts—commercial status not predetermined.

Except as prohibited by § 9.103, the clause set forth below is appropriate in (a) formally advertised construction contracts and (b) formally advertised contracts for supplies or component parts thereof when it is not determined in advance of issuing the invitation for bids that such supplies or component parts (or such supplies or component parts apart from relatively minor modifications to be made thereto) normally are or have been sold or offered for sale by any supplier to the public in the commercial open market:

PATENT INDEMNITY (NOT PREDETERMINED)

If the amount of this contract is in excess of $5,000, the Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States letters patent (except letters patents issued upon an application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government) arising out of the manufacture or delivery of supplies or component parts thereof, or out of construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this contract, or out of the use or disposal by or for the account of the Government, of such supplies, construction work, or component parts thereof, which supplies or component parts either normally are or have been sold or offered for sale to, and which construction work normally is of a type performed for, the public in the commercial open market by any supplier on or before the date set for opening of bids, or are such supplies, construction work, or component parts thereof, with relatively minor modifications made thereto. The foregoing indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof; and further, such indemnity shall not apply if: (i) the infringement results from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor; or (ii) the infringement results from addition to, or change in, such supplies or components furnished or construction work performed which addition or change was made subsequent to delivery or performance by the Contractor; or (iii) the claimed infringement is settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

§ 9.103–3 Patent indemnification in negotiated contracts.

A patent indemnity clause is not required to be included in negotiated contracts, but may be included in negotiated construction contracts and, except as otherwise authorized in § 9.103(a)(2), may be included in negotiated contracts for supplies only where such supplies normally are or have been sold or offered for sale by the contractor to the public in the commercial open market, or are such supplies with relatively minor modifications made thereto. Ordinarily, it should be quite feasible for the contracting officer to determine, in consultation with the contractor, whether the supplies being purchased normally are on sale or have been sold or offered for sale by the contractor to the public in the commercial open market.

(a) Subject to the foregoing and to the prohibitions in § 9.103, the clause set forth in § 9.103–1 (a) is approved for use in negotiated contracts for construction work or supplies.

(b) Certain supply contracts call only in part for items which normally are or have been sold or offered for sale by the contractor to the public in the commercial open market, or such items with relatively minor modifications. For the purpose of excluding from patent indemnification such specific items as normally are not or have not been sold or offered for sale by the contractor to the public in the commerical open market, the following sentence may be added to the end of the clause approved for use in paragraph (a) of this section.

The foregoing shall not apply to the following contract items:

(List the items to be excluded)

§ 9.103–4 Waiver of indemnity by the Government.

In the event that it is desired to exempt one or more specified United States patents from the indemnification provisions of the preceding clauses, authority shall first be obtained from the Secretary concerned or his authorized representative, and the following clause shall be included in the contract, in addition to the patent indemnity clause:

WAIVER OF INDEMNITY (JAN. 1955)

Any provision of this contract to the contrary notwithstanding, the Government hereby authorizes and consents to the use and manufacture, solely in the performance

of this contract, of any invention covered by the United States patents identified and listed below, and waives indemnification by the Contractor with respect to such patents: (Identify the patents by number or by other means if more appropriate)

§ 9.104 Notice and assistance.

The Government should be notified by the contractor of all claims of infringement in connection with the performance of a Government contract which come to the contractor's attention. The contractor should also assist the Government, to the extent of evidence and information in the possession of the contractor in connection with any suit against the Government, or any claim against the Government made before suit has been instituted, on account of any alleged patent infringement arising out of or resulting from the performance of the contract. Accordingly, the clause set forth below shall be included in all contracts in excess of $10,000 for supplies, construction, or experimental, developmental, or research work; except where Standard Form 32 is prescribed for use (in which case the clause may in the discretion of the contracting officer be used in lieu of that included in Standard Form 32): *Provided,* That the clause set forth below shall not be included in contracts—

(a) Where both performance and delivery are to be outside the United States, its Territories, its possessions, or Puerto Rico, unless the contract indicates that the supplies are ultimately to be shipped into the United States, its Territories, its possessions, or Puerto Rico; or,

(b) Of $10,000 or less, except that as a matter of administrative convenience, the clause need not be deleted when it is a part of a standard form being used for such contracts, since it is self-deleting:

NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT (OCT. 1958)

The provisions of this clause shall be applicable only if the amount of this contract exceeds $10,000.

(a) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of patent infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any suit against the Government, or any claim against the Government made before suit has been instituted, on account of any alleged patent infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed hereunder, the Contractor shall furnish to the Government, upon request, all evidence and information in possession of the Contractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except in those cases in which the Contractor has agreed to indemnify the Government against the claim being asserted.

§ 9.105 Processing of infringement claims.

The Military Departments shall process claims for alleged unauthorized use of inventions in accordance with instructions of each respective Military Department.

§ 9.106 Classified contracts.

Unauthorized disclosure of classified subject matter, whether in patent applications or resulting from the issuance of a patent, may be a violation of 18 U.S. Code 791 et seq. (Espionage and Censorship) and related statutes and may be contrary to the interests of national security. Accordingly, except as otherwise provided in § 9.106–1, the following clause shall be included in every classified contract and in every unclassified contract which covers or is likely to cover classified subject matter:

FILING OF PATENT APPLICATIONS (JAN. 1955)

(a) Before filing or causing to be filed a patent application disclosing any subject matter of this contract, which subject matter is classified "Secret" or higher, the Contractor shall, citing the thirty (30) day provision below, transmit the proposed application to the Contracting Officer for determination whether, for reasons of national security, such application should be placed under an order of secrecy or sealed in accordance with the provisions of 35 U. S. Code 181–188 or the issuance of a patent should be otherwise delayed under pertinent statutes or regulations; and the Contractor shall observe any instructions of the Contracting Officer with respect to the manner of delivery of the patent application to the U. S. Patent Office for filing, but the Contractor shall not be denied the right to file such patent application. If the Contracting Officer shall not have given any such instructions within thirty (30) days from the date of mailing or other transmittal of the proposed application, the Contractor may file the application.

(b) The Contractor shall furnish to the Contracting Officer, at the time of or prior to the time when the Contractor files or causes to be filed a patent application disclosing any subject matter of this contract, which subject matter is classified "Confidential," a copy of such application for determination whether, for reasons of national security, such application should be placed under an order of secrecy or the issuance of a patent should be otherwise delayed under pertinent statutes or regulations.

(c) In filing any patent application coming within the scope of this clause, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter.

§ 9.106–1 Classified contracts to be performed outside the United States.

The following clause shall be included in classified contracts and in every unclassificd contract which covers or is likely to cover classified subject matter where the work is to be performed outside the United States, its Territories, its possessions, or Puerto Rico, regardless of the place of delivery:

FILING OF PATENT APPLICATIONS (FOREIGN) (JAN. 1958)

While and so long as any subject matter of this contract is classified for reasons of security, the Contractor shall not file, or cause to be filed, in any country, an application or registration for a patent containing any of said subject matter without first obtaining written approval of the Contracting Officer.

§ 9.107 Patent rights.

§ 9.107–1 General.

(a) Under any contract or modification thereof having experimental, developmental, or research work as one of its purposes, the Government should receive a royalty-free, nonexclusive license to practice or have practiced any inventions conceived or first actually reduced to practice in the course of performing such work or in the course of performing any prior experimental developmental, or research work done upon the understanding in writing that a contract would be awarded. The contract cost or price should in no event be increased merely by reason of the inclusion of a patent rights clause.

(b) Except as expressly provided in § 9.107, and except with respect to contracts to be performed outside the United States, its Territories, its possessions, or Puerto Rico, patent license rights shall not be requested in the negotiation of contracts (other than contracts where the primary item of procurement is a license under or an assignment of a patent). It is the policy of the Department of Defense, except as otherwise provided in paragraph (a) of this section, to pay a reasonable compensation for the use of a valid patent enforceable against the Government, but the questions of infringement, validity, and enforceability of the patent shall be determined by personnel having cognizance of patent matters for the Department concerned.

§ 9.107–2 License rights: domestic contracts.

(a) *Exclusion of inventions from the license grant.* Upon request of the contractor, the contracting officer shall carefully consider and may exclude from the grant in the Patent Rights clause any invention which has not been actually reduced to practice, if it is covered by a United States patent issued or application for patent filed by or on behalf of the contractor prior to the award of a contract when he finds one or more of the following circumstances to be established:

(1) The contractor has expended sums in developing the invention (as represented by research and development costs and expenses for preparing and prosecuting the patent application) which are relatively large in comparison to the amount of the proposed contract or such portion of the proposed contract amount as can be allocated in advance for the development of such an invention (in determining the sums expended by the contractor there shall be included only amounts which can be allocated to the invention which is to be excluded; such sums shall not include the entire cost of a research department or program which cannot be allocated as above provided);

(2) The practicability of such an invention has been established as by engineering design;

(3) The invention covers a basic material and it is not the purpose of the contract to develop such material; or

(4) The invention is useful only for military purposes and the contractor does not have facilities for furnishing the item to the Government in production quantities.

Any inventions to be excluded from the license grant by reason of the foregoing circumstances shall be specifically identified and listed in the contract Schedule.

(b) *Contract clause.* The clause set forth below shall be included in every contract having as one of its purposes experimental, developmental, or research work which is to be performed within the United States, its Territories, its possessions, or Puerto Rico, except as provided in § 9.107–7 with respect to contracts on behalf of the National Aeronautics and Space Administration. See § 16.809 of this chapter for an approved form for optional use by contractors in reporting information required by paragraphs (c)(ii), (c)(iii), and (h) of the clause. In the administration of paragraph (e) of the clause, a request for conveyance of foreign rights to the Government is not required when the contractor does not file an application for patent in a foreign country under the conditions provided in that paragraph, unless the Government intends to apply for such patent.

PATENT RIGHTS (MAR. 1960)

(a) As used in this clause, the following terms shall have the meanings set forth below:

(i) The term "Subject Invention" means any invention, improvement, or discovery (whether or not patentable) conceived or first actually reduced to practice either—

(A) In the performance of the experimental, developmental, or research work called for or required under this contract; or

(B) In the performance of any experimental, developmental, or research work relating to the subject matter of this contract which was done upon an understanding in writing that a contract would be awarded: *Provided*, That the term "Subject Invention" shall not include any invention which is specifically identified and listed in the Schedule for the purpose of excluding it from the license granted by this clause.

(ii) The term "Technical Personnel" means any person employed by or working under contract with the Contractor (other than a subcontractor whose responsibilities with respect to rights accruing to the Government in inventions arising under subcontracts set forth in (g), (h), and (i) below) who, by reason of the nature of his duties in connection with the performance of this contract, would reasonably be expected to make inventions.

(iii) The terms "subcontract" and "subcontractor" mean any subcontract or subcontractor of the Contractor, and any lower-tier subcontract or subcontractor under this contract.

(b)(1) The Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, nontransferable, and royalty-free license to practice, and cause to be practiced by or for the United States Government, throughout the world, each Subject Invention in the manufacture, use, and disposition according to law, of any article or material, and in the use of any method. Such license includes the practice of Subject Invention in the manufacture, use, and disposition of any article or material, in the use of any method, or in the performance of any service acquired by or for the Government or with funds derived through Mutual Security Program of the Government or otherwise through the Government. No license granted herein shall convey any right to the Government to manufacture, have manufactured, or use any Subject Invention for the purpose of providing services or supplies to the general public in competition with the Contractor or the Contractor's commercial licensees in the licensed fields.

(2) With respect to:

(i) Any Subject Invention made by other than Technical Personnel;

(ii) Any Subject Invention conceived prior to, but first actually reduced to practice in the course of, any of the experimental, developmental, or research work specified in (a)(i) above; and

(iii) The practice of any Subject Invention in foreign countries; the obligation of the Contractor to grant a license as provided in (b)(1) above, to convey title as provided in (d)(ii)(B) or (d)(iv) below, and to convey foreign rights as provided in (e) below, shall be limited to the extent of the Contractor's right to grant the same without incurring any obligation to pay royalties or other compensation to others solely on account of said grant. Nothing contained in this Patent Rights clause shall be deemed to grant any license under any invention other than a Subject Invention.

(c) The Contractor shall furnish to the Contracting Officer the following information and reports concerning Subject Inventions which reasonably appear to be patentable:

(i) A written disclosure promptly after conception or first actual reduction to practice of each such Invention together with a written statement specifying whether or not a United States patent application claiming the Invention has been or will be filed by or on behalf of the Contractor;

(ii) Interim reports at least every twelve months, commencing with the date of this contract, each listing all such Inventions conceived or first actually reduced to practice more than three months prior to the date of the report, and not listed on a prior interim report, or certifying that there are no such unreported Inventions; and

(iii) Prior to final settlement of this contract, a final report listing all such Inventions including all those previously listed in interim reports.

(d) In connection with each Subject Invention referred to in (c)(i) above, the Contractor shall do the following:

(i) If the Contractor specifies that a United States patent application claiming such Invention will be filed, the Contractor shall file or cause to be filed such application in due form and time; however, if the Contractor, after having specified that such an application would be filed, decides not to file or cause to be filed said application, the Contractor shall so notify the Contracting Officer at the earliest practicable date and in any event not later than eight months after first publication, public use or sale.

(ii) If the Contractor specifies that a United States patent application claiming such Invention has not been filed and will not be filed (or having specified that such an application will be filed thereafter notifies the Contracting Officer to the contrary), the Contractor shall:

(A) Inform the Contracting Officer in writing at the earliest practicable date of any publication of such Invention made by or known to the Contractor or, where applicable, of any contemplated publication by the Contractor, stating the date and identity of such publication or contemplated publication; and

(B) Convey to the Government the Contractor's entire right, title, and interest in of any contemplated publication by the Contractor, stating the date and identity of such duly executed instruments (prepared by the Government) of assignment and application, and such other papers as are deemed necessary to vest in the Government the Contractor's right, title, and interest aforesaid, and the right to apply for and prosecute patent applications covering such Invention throughout the world, subject, however, to the rights of the Contractor in foreign applications as provided in (e) below, and subject further to the reservation of a nonexclusive and royalty-free license to the Contractor (and to its existing and future associated and affiliated companies, if any, within the corporate structure of which the Contractor is a part) which license shall be assignable to the successor of that part of the Contractor's business to which such Invention pertains;

(iii) The Contractor shall furnish promptly to the Contracting Officer on request an irrevocable power of attorney to inspect and make copies of each United States patent application filed by or on behalf of the Contractor covering any such Invention;

(iv) In the event the Contractor, or those other than the Government deriving rights from the Contractor, elects not to continue prosecution of any such United States patent application filed by or on behalf of the Contractor, the Contractor shall so notify the Contracting Officer not less than sixty days before the expiration of the response period and, upon written request, deliver to the Contracting Officer such duly executed instruments (prepared by the Government) as are deemed necessary to vest in the Government the Contractor's entire right, title, and interest in such Invention and the application, subject to the reservation as specified in (d)(ii) above; and

(v) The Contractor shall deliver to the Contracting Officer duly executed instruments fully confirmatory of any license rights herein agreed to be granted to the Government.

(e) The Contractor, or those other than the Government deriving rights from the Contractor, shall, as between the parties hereto, have the exclusive right to file applications on Subject Inventions in each foreign country within:

(i) Nine months from the date a corresponding United States application is filed;

(ii) Six months from the date permission is granted to file foreign applications where such filing had been prohibited for security reasons; or

(iii) Such longer period as may be approved by the Contracting Officer.

The Contractor shall, upon written request of the Contracting Officer convey to the Government the Contractor's entire right, title, and interest in each Subject Invention in each foreign country in which an application has not been filed within the time above specified, subject to the reservation of a nonexclusive and royalty-free license to the Contractor together with the right of the Contractor to grant sublicenses, which license and right shall be assignable to the successor of that part of the Contractor's business to which the Subject Invention pertains.

(f) If the Contractor fails to deliver to the Contracting Officer the interim reports required by (c)(ii) above, or fails to furnish the written disclosures for all Subject Inventions required by (c)(i) above shown to be due in accordance with any interim report delivered under (c)(ii) or otherwise known to be unreported, there shall be withheld from payment until the Contractor shall have corrected such failures either ten percent (10%) of the amount of this contract, as from time to time amended, or five thousand dollars ($5,000), whichever is less. After payment of eighty percent (80%) of the amount of this contract, as from time to time amended, payment shall be withheld until a reserve of either ten percent (10%) of such amount, or five thousand dollars ($5,000), whichever is less, shall have been set aside, such reserve or balance thereof to be retained until the Contractor shall have furnished to the Contracting Officer:

(i) The final report required by (c)(iii) above;

(ii) Written disclosures for all Subject Inventions required by (c)(i) above which are shown to be due in accordance with interim reports delivered under (c)(ii) above, or in accordance with such final reports, or are otherwise known to be unreported; and

(iii) The information as to any subcontractor required by (h) below.

The maximum amount which may be withheld under this paragraph (f) shall not exceed ten percent (10%) of the amount of this contract or five thousand dollars ($5,000), whichever is less, and no amount shall be withheld under this paragraph (f) when the amount specified by this paragraph (f) is being withheld under other provisions of this contract. The withholding of any amount or subsequent payment thereof to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract. This paragraph (f) shall not be construed as requiring the Contractor to withhold any amounts from a subcontractor to enforce compliance with the patent provisions of a subcontract.

(g) The Contractor shall exert all reasonable effort in negotiating for the inclusion of a patent rights clause containing all the provisions of this Patent Rights clause except provisions (f) and (i) in any subcontract hereunder of three thousand dollars ($3,000) or more having experimental, developmental, or research work as one of its purposes. In the event of refusal by a subcontractor to accept such a patent rights clause, the Contractor shall not proceed with the subcontract without written authorization of the Contracting Officer or unless there has been a waiver of the requirement as hereinafter provided. The Contractor, if unable to comply with the requirement that such a patent rights clause be included in a subcontract after exerting all reasonable effort to do so, may submit to the Contracting Officer a written request for waiver or modification of such requirement. If, within thirty-five (35) days after the receipt of such request, the Contracting Officer does not mail or otherwise furnish the Contractor written denial of such request or notification that the Government requests the Contractor's cooperation with the Government, which the Contractor agrees to provide, in negotiating with the subcontractor for the acceptance of a suitable patent rights clause, the requirement shall be deemed to have been waived by the Contracting Officer as to all patent rights provisions with respect to Subject Inventions, except such provisions, if any, relating to the production or utilization of special nuclear material or atomic energy. Such request shall specifically state that the Contractor has used all reasonable effort to comply with said requirement and shall cite the waiver provision hereinabove set forth. The Contractor is not required, when negotiating with a subcontractor, to obtain in behalf of the Government any rights in Subject Inventions other than as provided herein. However, the Contractor is not precluded from separately negotiating with a subcontractor for rights in Subject Inventions for the Contractor's own behalf, but any costs so incurred shall not be considered as an allowable charge or cost under this contract. Reports, instruments, and other information required to be furnished by a subcontractor to the Contracting Officer under the provisions of such a patent rights clause in a subcontract hereunder may, upon mutual consent of the Contractor and the subcontractor (or by direction of the Contracting Officer) be furnished to the Contractor for transmission to the Contracting Officer.

(h) The Contractor shall, at the earliest practicable date, notify the Contracting Officer in writing of any subcontract containing one or more patent rights clauses; furnish the Contracting Officer a copy of each of such clauses; and notify the Contracting Officer when such subcontract is completed. It is understood that with respect to any subcontract clause granting rights to the Government in Subject Inventions, the Government is a third party beneficiary; and the Contractor hereby assigns to the Government all the rights that the Contractor would have to enforce the subcontractor's obligations for the benefit of the Government with respect to Subject Inventions. If there are no subcontracts containing patent rights clauses, a negative report is required. The Contractor shall not be obligated to enforce the agreements of any subcontractor hereunder relating to the obligations of the subcontractor to the Government in regard to Subject Inventions.

(i) When the Contractor shows that it has been delayed in the performance of this contract by reason of the Contractor's inability to obtain, in accordance with the requirements of (g) above, the prescribed or other authorized suitable patent rights clause from a qualified subcontractor for any item or service required under this contract for which the Contractor itself does not have available facilities or qualified personnel, the Contractor's delivery dates shall be extended for a period of time equal to the duration of such delay. Upon request of the Contractor, the Contracting Officer shall determine to what extent, if any, an additional extension of the delivery dates and increase in contract prices based upon additional costs incurred by such delay are proper under the circumstances; and the contract shall be modified accordingly.

(j) The Contractor recognizes that the Government, or a foreign government with funds derived through the Mutual Security Program or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to the Contractor for royalties for the use of a Subject Invention on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Mutual Security Program or otherwise through the United States Government, charges for use of patents in which the Government holds a royalty-free license. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

§ 9.107–3 License rights—foreign contracts.

A patent rights clause shall be included in every contract having as one of its purposes experimental, developmental, or research work which is to be performed outside the United States, its Territories, its possessions, or Puerto Rico. The clause set forth below may be used except as provided in § 9.107–7 with respect to contracts on behalf of the National Aeronautics and Space Administration; however, any other clause tailored to meet requirements peculiar to foreign procurement may be used in lieu thereof: *Provided,* It incorporates the principles of the clause below, except that principles of paragraphs (c) and (d) thereof may be omitted if, in the opinion of the contracting officer (on a case-by-case basis), the inclusion of withholding or other enforcement provisions is neither desirable nor necessary.

PATENT RIGHTS (OCT. 1958)

(a) The Contractor agrees to and does hereby grant to the United States Government an irrevocable, nonexclusive, nontransferable, and royalty-free license to practice and cause to be practiced, by or for the United States Government, throughout the world, in the manufacture, use and disposition of any article or material, and in the use of any method, each invention (whether or not patentable) conceived or made in the performance of the experimental, developmental or research work called for or required under this contract.

(b) With respect to inventions referred to in (a) above, the Contractor:

(i) Shall submit to the Contracting Officer, promptly after the conception or making of each such invention, a descriptive written disclosure thereof, and shall specify concurrently with the submission of each disclosure whether or not a patent application has been filed or will be filed by or on behalf of the Contractor and in which countries such application has been or will be filed;

(ii) Shall upon request deliver to the Contracting Officer duly executed instruments fully confirmatory of the license rights granted in (a) above; but failure to execute such an instrument shall in no way detract from the license granted in (a) above;

(iii) Shall inform the Contracting Officer in writing at the earliest practicable date of any publication thereof made by or known to the Contractor or, where applicable, of any contemplated publication by the Contractor, stating the date and identity of such publication or contemplated publication;

(iv) Has, as between the parties hereto, the exclusive right except as hereinafter provided, to file a patent application thereon not later than nine (9) months after the date of submission to the Contracting Officer of the disclosure required in (i) above, or the date of first publication or public use or sale by or for the Contractor, whichever of such dates is earlier. Upon request of the Contractor, the nine-months period may be extended by the Contracting Officer. No patent application shall be filed by other than the United States Government, without the prior consent of the Contracting Officer, in any country and on any invention with respect to which the Contractor has either specified that it will not file an application or has not filed within the period set forth in this paragraph after having specified that it will file;

(v) Shall inform the Contracting Officer immediately of the filing of a patent application in any country, identifying the country or countries in which such filing occurs and the date and serial number of the application, and shall furnish a copy of each such application;

(vi) Shall notify the Contracting Officer promptly of an election to abandon any patent application filed thereon, whether by discontinuing the prosecution of the application or otherwise, and shall not proceed with such abandonment for a period of sixty (60) days after the date of such notice unless otherwise authorized in writing by the Contracting Officer;

(vii) Shall, upon written request of the Contracting Officer, execute and deliver an instrument conveying to the United States Government all right, title, and interest in each such invention in each country in which an application for patent either has not been filed within the time period specified in (iv) above or, if filed, is the subject of the notification referred to in (vi) above: *Provided,* That such conveyance shall be subject to the reservation of a nonexclusive and royalty-free license to the Contractor in countries other than the Contractor's own country and the United States together with the right of the Contractor to grant sublicenses in such other countries;

(viii) Shall enter into such arrangements, by contract or otherwise, with its employees and subcontractors as may be necessary to insure that the Contractor will be able to comply with this Patent Rights clause; and

(ix) shall, prior to final settlement of this contract, notify the Contracting Officer in writing in the event that no inventions are conceived or made in the performance of the experimental, developmental or research

work called for or required under this contract.

(c) If the Contractor fails to deliver to the Contracting Officer the disclosures required by (b) (i) above, there shall be withheld from payment, until the Contractor shall have corrected such failure, either ten percent (10%) of the amount of this contract as from time to time amended or five thousand dollars ($5,000), whichever is less. After payment of eighty percent (80%) of the amount of this contract as from time to time amended, payment shall be withheld until a reserve of either ten percent (10%) of the amount of this contract or five thousand dollars ($5,000), whichever is less, shall have been set aside; such reserve or balance thereof to be retained until the Contractor shall have furnished to the Contracting Officers the written disclosures, information, notices, and instruments required by (b) (ii), (b) (iii), (b) (v), (b) (vi), (b) (vii), and (b) (ix), above.

(d) The maximum amount which may be withheld under (c) above shall not exceed ten percent (10%) of the amount of this contract or five thousand dollars ($5,000), whichever is less, and no amount shall be withheld under the provision of (c) above when the amount specified therein is being withheld under other provisions of this contract. The withholding of any amount or subsequent payment thereof to the Contractor shall not be construed as a waiver of any rights accruing to the United States Government under this contract.

§ 9.107–4 Contracts relating to atomic energy.

(a) Except as provided in (b) below, the following paragraph shall be inserted as a part of the Patent Rights clause set forth in § 9.107–2 in all research or development contracts relating to atomic energy.

(j) With respect to any Subject Invention made by employees of the Contractor (except clerical and manual labor personnel who do not have access to technical data), and relating to the production or utilization of special nuclear material or atomic energy within the purview of the Atomic Energy Acts of 1946 (42 U. S. Code 1801–1819) and of 1954 (42 U. S. Code 2011–2296), the Contractor agrees:

(i) To furnish to the United States Atomic Energy Commission (hereinafter in this paragraph (j) referred to as "the Commission") through the Contracting Officer complete information regarding such Subject Invention, the Commission to have the sole and conclusive power to determine whether and where a patent application shall be filed, and to determine the disposition of the title to and rights under any such application or any patent that may issue thereon;

(ii) To obtain the execution of and deliver to the Commission, all documents relating to each such Subject Invention and to do all things necessary or proper to carry out any determination of the Commission, made under (j) (i) above;

(iii) Unless otherwise authorized in writing by the Commission to obtain patent agreements from all such employees to effectuate the purposes of this paragraph (j); and

(iv) Unless otherwise authorized in writing by the Commission, to insert this paragraph (j) in all subcontracts.

No claim for pecuniary award or compensation under the provisions of the Atomic Energy Acts of 1946 and 1954 shall be asserted by the Contractor or its employees with respect to any Subject Invention covered by this paragraph. (Dec. 1955)

(b) Where the work to be performed or the material or equipment to be furnished by the contractor is of such character that any such Subject Inventions that may be made will probably (1) relate only incidentally (and not directly) to some phase of the basic research or development work which the Atomic Energy Commission conducts or sponsors, (2) relate to a field or work in which the contractor has an established industrial and patent position, or (3) result from routine development or production work by the contractor, a provision authorizing the contractor to retain license rights may be incorporated in the paragraph set forth in paragraph (a) of this section. Any such provision or any deviation from the paragraph set forth in paragraph (a) of this section, which the Military Department concerned proposes to authorize, shall be forwarded in accordance with Departmental procedures to the Atomic Energy Commission for recommendation and shall not be authorized except with the concurrence of the Atomic Energy Commission.

§ 9.107–5 Contracts relating to civil defense.

In all contracts for experimental, developmental, or research work relating primarily to supplies or services intended for the general public for civil defense purposes, in lieu of paragraph (b) (1) of the Patent Rights clause prescribed in § 9.107–2(b), the paragraph set forth below—

(a) Shall be inserted in all such contracts entered into on behalf of and funded in whole by the Office of Defense and Civil Mobilization, unless such Office agrees to its exclusion; and

(b) May be inserted in all such contracts other than those in (a) above.

(b) (1) The Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, nontransferable, and royalty-free license to practice, and cause to be practiced by or for the United States Government, throughout the world, each Subject Invention in the manufacture, use, and disposition of any article or material, and in the use of any method; with the right in the Government to sublicense others to practice each Subject Invention in the manufacture, use and sale of any article or in the use of any method for the purpose of providing supplies or services to the general public in the furtherance of the nation's civil defense. (Jan. 1958)

§ 9.107–6 Patent license rights under product improvement programs or independent research programs.

Where a Military Department, under its established procedures, provides substantial financial support to a contractor's—

(a) Specific product improvement program; or

(b) Specific projects within its independent research program;

the Military Department may obtain for the Government patent license rights to inventions, improvements, or discoveries conceived or first actually reduced to practice during or as a result of such support: *Provided*, The obtaining of such rights and the contractual arrangements for such rights are approved in the Army and the Navy by the Head of the Procuring Activity concerned, and in the Air Force by the Deputy Director/Procurement, Headquarters, Air Materiel Command or by the Director of Procurement, Headquarters, Air Research and Development Command.

§ 9.107–7 Contracts placed for NASA.

(a) *"Property rights in inventions" clause.* (1) The National Aeronautics and Space Administration (NASA) will from time to time request the Departments to perform work on behalf of NASA. Such requests will state whether or not the NASA "Property Rights in Inventions" clause is required in any contract let by the Departments on behalf of NASA for the performance of the work. The following rules explain the use of patent rights clauses in such contracts.

(i) If the request states that the NASA "Property Rights in Inventions" clause is required in any resulting contract and the work to be performed is not severable and is funded wholly or in part by NASA, then the NASA "Property Rights in Inventions" clause and no other patent rights clause shall be included in the contract.

(ii) If the request states that the NASA "Property Rights in Inventions" clause is required in any resulting contract and the work to be performed under the contract is severable and is only in part for NASA, then the work which is on behalf of NASA shall be identified in the contract and the NASA "Property Rights in Inventions" clause shall be made applicable thereto. That portion of the work for a Department shall likewise be identified and the clause contained in § 9.107–2(b), or that in § 9.107–3, as appropriate, shall be made applicable to such portion if a patent rights clause is required by this part.

(iii) If the request states that the NASA "Property Rights in Inventions" clause is not required in any resulting contract and the work to be performed under the contract is not wholly on behalf of NASA, then the clause contained in § 9.107–2(b) or that in § 9.107–3, as appropriate, shall be used if a patent rights clause is required by this regulation.

(iv) If the request states that the NASA "Property Rights in Inventions" clause is not required in any resulting contract and such contract is wholly on behalf of NASA, then no patent rights clause shall be included in such contract.

(v) If the NASA "Property Rights in Inventions" clause is stated as a requirement in any such contract, the then current "Property Rights in Inventions" clause will be furnished with the request for work and, if not furnished, it must be obtained from NASA and included in the contract.

(2) The price of any contract described in subparagraph (1) of this paragraph shall in no event be increased by reason of the inclusion of any patent rights clause in the contract.

(b) *Deviations.* No deviations shall be made under § 1.109 in any NASA "Property Rights in Inventions" clause except in paragraph (g), (h), (ii), (i), (j), and (k) thereof. Deviations from these paragraphs are hereby authorized if they parallel either variations authorized by the Regulation from the corre-

sponding provisions of the Patent Rights clause of § 9.107–2(b), or deviations from such corresponding provisions which have been approved under § 1.109–3 of this chapter. Deviations other than those indicated above shall not be made without prior approval of NASA. Requests for such deviations, whether individual or blanket, shall be processed in accordance with § 1.109–3 of this chapter.

§ 9.108 Patent rights under contracts for personal services.

The following clause shall, except as otherwise provided in § 7.503–9 of this subchapter, be inserted in all personal services contracts for services to be performed by an individual as set forth in § 7.502 of this subchapter.

PATENTS (DEC. 1953)

(a) For the purpose of determining the rights of the Government and the Contractor in and to inventions, the Contractor agrees to be bound by all provisions of Executive Order 10096, dated 23 January 1950, and any orders, rules, regulations, or the like issued thereunder.

(b) The Contractor shall: (i) make written disclosure promptly to the Contracting Officer of all inventions of the Contractor which are conceived or first reduced to practice during the term of this contract, and sign and execute all papers necessary for conveying to the Government the rights to which the Government is entitled in accordance with the determination made under the provisions of Executive Order 10096, or (ii) certify to the Contracting Officer that, to the best of the Contractor's knowledge and belief, no inventions have been conceived or first reduced to practice during the term of this contract.

§ 9.109 Followup of patent rights.

Appropriate systems of followup in connection with contracts for experimental, developmental, or research work shall be maintained by the Military Departments in order that inventions in which the Government may have an interest may be properly identified and formal agreements evidencing the Government's rights therein shall be obtained.

§ 9.110 Reporting of royalties.

(a) (1) The Government has acquired license and other rights under a large number of inventions as the result of Government-sponsored research and development and in other ways. In order that the Government may determine whether the charging of royalties to the Government is inconsistent with the rights which the Government has acquired or is otherwise improper, and in order that negotiation for the reduction of excessive royalties may be undertaken, the Departments should be informed of royalties charged or to be charged in connection with the performance of Government contracts. DD Form 633, Cost and Price Analysis (see § 16.206), and DD Form 784, Cost Analysis for Contract Price Redetermination (see § 16.207), provide for reporting royalty information as required in (2) below. Royalty information generally should not be required in formally advertised procurements.

(2) (i) Where it is expected that the work may be performed in the United States, its Territories, its possessions, or Puerto Rico, any solicitation which may result in a negotiated contract estimated to exceed $10,000 shall contain a special provision substantially as follows:

ROYALTY INFORMATION (APR. 1959)

When the response to this solicitation contains costs or charges for royalties totaling more than $250, the following information shall be furnished with the offer, proposal, or quotation on each separate item of royalty or license fee:

(i) Name and address of licensor;
(ii) Date of license agreement;
(iii) Patent numbers, patent application serial numbers or other basis on which the royalty is payable;
(iv) Brief description, including any part or model numbers of each contract item or component or which the royalty is payable;
(v) Percentage or dollar rate of royalty per unit;
(vi) Unit price of contract item;
(vii) Number of units; and
(viii) Total dollar amount of royalties.

In addition, if specifically requested by the contracting officer prior to execution of the contract, a copy of the current license agreement and identification of applicable claims of specific patents shall be furnished.

(ii) Where the work is to be performed in the United States, its Territories, its possessions, or Puerto Rico, the contracting officer, upon receipt of an offer, proposal, or quotation, which includes a charge for royalties, shall, prior to award of the contract, forward the information called for by subdivision (i) of this subparagraph to the office having cognizance of patent matters for the procuring activity concerned. The cognizant office shall promptly advise the contracting officer as to appropriate action. The contracting officer shall then take action in respect to such royalties, having due regard to all pertinent factors relating to the proposed procurement.

(iii) Where subcontract work is to be performed in the United States, its Territories, its possessions, or Puerto Rico, the contracting officer, when considering approval of a subcontract, shall require the same information and take the same action with respect to such subcontracts in relation to royalties as required for prime contracts under subdivision (ii) of this subparagraph.

(b) A reporting of royalties clause is not required in contracts where the work is to be performed in the United States, its Territories, its possessions, or Puerto Rico. In negotiated contracts to be performed outside the United States, its Territories, its possessions or Puerto Rico, regardless of the place of delivery, the clause set forth below shall be included. See § 16.806 for an approved form for optional use by contractors in submitting the required report.

REPORTING OF ROYALTIES (FOREIGN) (JAN. 1958)

If this contract is in an amount which exceeds $50,000, the Contractor shall report in writing to the Contracting Officer during the performance of this contract the amount of royalties paid or to be paid by the Contractor directly to others in the performance of this contract. The Contractor shall also (i) furnish in writing any additional information relating to such royalties as may be requested by the Contracting Officer and (ii) insert a provision similar to this clause in any subcontract hereunder which involves an amount in excess of the equivalent of fifty thousand United States dollars.

§ 9.111 Adjustment of royalties.

If the contracting officer believes that any royalties paid, or to be paid, under a contract or prospective contract are unreasonable or otherwise improper, he should promptly report the matter to personnel having cognizance of patent matters for the procuring activity concerned. Such personnel shall review the royalties thus reported and such royalties as are reported under § 9.110. In coordination with the contracting officer, such personnel shall:

(a) Take prompt action to protect the Government against payment of royalties on supplies or services (1) with respect to which the Government has a royalty-free license, or (2) at a rate in excess of the rate at which the Government is licensed, or (3) where the royalties in whole or in part constitute an improper charge;

(b) In appropriate cases enter into negotiation for a voluntary reduction of royalties.

§ 9.112 [Reserved]

Subpart B—Data and Copyrights

§ 9.200 Scope of subpart.

This subpart sets forth the Department of Defense policy, implementing instructions, and contract clauses with respect to acquisition and use of data and copyrights. The policy and procedures set forth in this subpart apply to all data required to be delivered to the Government under a contract whether such data originates with the contractor or a subcontractor.

§ 9.201 Definitions.

For the purpose of this subpart, the following terms have the meanings set forth below:

(a) "Data" means writings, sound recordings, pictorial reproductions, drawings, or other graphic representations and works of any similar nature whether or not copyrighted. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) "Proprietary data" means data providing information concerning the details of a contractor's secrets of manufacture, such as may be contained in but not limited to its manufacturing methods or processes, treatment and chemical composition of materials, plant layout and tooling, to the extent that such information is not disclosed by inspection or analysis of the product itself and to the extent that the contractor has protected such information from unrestricted use by others.

(c) "Other data" means all data other than "proprietary data" and includes:

(1) Operational data which provides information suitable among other things for instruction, operation, maintenance, evaluation or testing; and

(2) Descriptive data which provides descriptive or design drawings or descriptive material in the nature of design specifications which, although not including any "proprietary data," may

nevertheless be adequate to permit manufacture by other competent firms.

(d) "Standard commercial items" means supplies or services which normally are or have been sold or offered to the public commercially by any supplier.

§ 9.202 Acquisition and use of data.

§ 9.202–1 Acquisition of data.

(a) *General.* It is the policy of the Department of Defense to encourage inventiveness and to provide incentive therefor by honoring the "proprietary data" resulting from private developments and hence to limit demands for data to that which is essential for Government purposes. The activity responsible for initiating a purchase request, after consultation with the procurement activity whenever feasible, will carefully determine the use contemplated for the data to be acquired and will specify only such data as is determined to be necessary to satisfy such use. All data received by the Government under a contract shall be identified with the number of the contract under which it is furnished. This may be accomplished by any appropriate means. Generally it should not be necessary to obtain "proprietary data" to satisfy Government requirements. The acquisition of data from a subcontractor shall be governed by the nature and circumstances of the subcontract, it being the intent of the Department of Defense that in obtaining data originating with subcontractors, the contractor shall, insofar as carrying out his obligations under a prime contract is concerned, be guided by the same policies and procedures as if the subcontractor were contracting directly with the Government and should not request unlimited rights in "proprietary data" where such rights are not required by the Government under the prime contract.

(b) *Supply contracts and subcontracts thereunder.* In advertised contracts and in contracts and subcontracts for standard commercial items, "proprietary data" shall not be requested. "Proprietary data" will be obtained for the Government under other supply contracts and subcontracts thereunder only when a clear Government need for such data is established and in such event the requirement for "proprietary data" will be specified in the contract Schedule (see the clause in § 9.203–2). When "proprietary data" is obtained under supply contracts, there shall be a specific negotiation for such data and the contractual requirement shall be listed as a separate contract item.

(c) *Contracts for experimental, developmental, or research work and subcontracts thereunder.* In a contract which has as one of its principal purposes experimental, developmental, or research work and also calls for models of equipment or practical processes, the contractor shall be required to furnish to the Government for the price of the work all data resulting directly from performance of the contract, whether or not it would otherwise be "proprietary data." In addition, the contractor shall be required to furnish all data necessary to enable reproduction or, where appropriate, manufacture of the equipment or performance of the process which is developed, and the Schedule of the contract shall set forth the data required, subject to the exceptions set forth below:

(1) Such data shall not be required for standard commercial items to be furnished under the contract and to be incorporated as component parts in or to be used with the product or process being developed if in lieu thereof the contractor shall furnish identification of source and characteristics (including performance specifications, when necessary) sufficient to enable the Government to practice the process or to procure the part or an adequate substitute; and

(2) "Proprietary data" shall not be required for other items, including minor modifications thereof, which were developed at private expense and previously sold or offered for sale and which are to be incorporated as component parts in or to be used with the product or process being developed, if in lieu thereof the contractor shall identify such other items and that "proprietary data" pertaining thereto which is necessary to enable reproduction or manufacture of the item or performance of the process.

Where the contractor asserts and it is determined in the negotiation preceding the execution of the contract that the contractor has previously developed "proprietary data," other than that described in subparagraph (2) of paragraph (c) of this section, that such data will be used in the product or process developed under the contract, and that such product cannot readily be manufactured or the process practiced without the use of such previously developed "proprietary data," a suitable price (or provision therefor) may be negotiated: *Provided,* That the contractor requests payment for such data, and the Government does not have rights to such data (other than the "Limited Rights" provided for by the paragraph of § 9.203–3).

§ 9.202–2 Use of data.

(a) *Other data.* When data other than "proprietary data" is obtained, it shall be obtained without any limitation on its use by the Government.

(b) *"Proprietary data"*—(1) *Supply contracts.* When "proprietary data" is obtained by negotiation under a supply contract, in accordance with § 9.202–1 (b), the purposes for obtaining it will govern its use. If it is obtained for the purpose of enabling the Government to establish additional sources of supply, it shall be obtained without limitation as to its use; in such case the contract clause in §§ 9.203–1 and 9.203–2 shall be included in the contract and the requirement for the "proprietary data" will be specified in the contract Schedule. However, where it has been determined to be necessary to obtain "proprietary data" for some limited purpose, such as emergency manufacture by the Government, such data may be obtained subject to limitation as to its use; in such case the contract clause in §§ 9.203–1, 9.203–2 and 9.203–3 shall be included in the contract and the contract Schedule shall suitably identify the data which shall be subject to limited use.

(2) *Contracts for experimental, developmental, or research work.* When "proprietary data" is obtained under a contract having as one of its principal purposes experimental, developmental, or research work, in accordance with § 9.202–1 (c), it shall be obtained without limitation as to its use; in such case the contract clause in §§ 9.203–1 and 9.203–4 shall be included in the contract.

§ 9.202–3 Multiple sources of supplies.

The Government's interest in establishing multiple sources for supplies and services arises when it is necessary to (i) insure fulfillment of its current and mobilization requirements or (ii) permit competition for defense procurement to avoid unreasonable prices. The policies in this subpart provide one means for accomplishing this objective and are particularly effective where data, other than "proprietary data," acquired by the Government, is useable, without more, to obtain multiple sources. Where the use of "proprietary data" is necessary for the production of an item developed at private expense, it is the policy of the Department of Defense to honor the proprietary nature of such data since it is recognized that it is in the Government's interest to foster private development of items having military usefulness. Accordingly, "proprietary data," not otherwise obtained pursuant to the policy set out in § 9.202–1 (c), will be obtained by the Government for the purpose of establishing multiple sources only where such sources cannot otherwise be established. This should occur only in isolated cases as necessary to achieve the objectives in (i) and (ii). In preference to having the Government obtain "proprietary data" for the purpose of creating multiple sources, it is the policy to achieve these objectives to the extent possible through one of the following procedures:

(a) The acquisition by the Government of "proprietary data" developed at private expense may be unnecessary where the primary source is willing to establish other sources by direct contractor licensing arrangements without Government participation. Where complex technical equipment is involved and the establishment of a satisfactory second source will require, in addition to data, technical assistance from the primary source or Government facilities or other unusual assistance, Government participation in any licensing and technical assistance arrangements between contractors may be necessary to protect the Government's interest with respect to such factors, among others, as (1) investment in facilities, (2) competency of source, (3) timing of establishment of second sources, and (4) allocation of orders among sources.

(b) The acquisition of "proprietary data" developed at private expense may be avoided in many cases by providing for the development of suitable substitutes for such sole source items through the use of performance specifications.

No single method can be prescribed for meeting the second source problem; each situation must be handled on its own merits.

§ 9.202–4 Delivery of data for use in foreign countries.

Where the Department of Defense proposes to make available any data in its possession for use in a foreign country, it shall, to the maximum extent practicable, give reasonable notice thereof to the contractor who furnished the data: *Provided,* That the contractor has previously requested such notice in order to protect its foreign patent position.

§ 9.202–5 Copyrights.

It is the policy of the Department of Defense generally to reserve only a license under copyright on any copyrighted data, leaving the contractor free to copyright the material. With respect to certain data produced, written, or compiled for the Department of Defense, such as (a) motion pictures and works relating thereto, and (b) histories and other works relating to operation of the Department of Defense, the Government may desire that no adverse claim of copyright be established in such data, and that the Government's right to reproduce and use such data shall be unlimited.

§ 9.202–6 Data furnished on a restricted basis in support of a proposal.

When an offeror has submitted data on a restricted basis in accordance with § 3.109 of this chapter in response to a request for a proposal, and it is proposed to award the contract to such offeror, the contracting officer shall ascertain whether it is desired to acquire rights to use all or part of the data furnished with the proposal. If it is desired to acquire such rights, the contracting officer shall determine in accordance with § 9.201 whether such data is proprietary in nature, and shall negotiate with the offeror in accordance with the policy prescribed in § 9.202 for the acquisition and use of such data. If the offeror agrees to furnish such data under the contract, the appropriate clause of § 9.203 shall be inserted in the contract, and the Schedule shall identify the data to be covered by such clause.

§ 9.203 Contract clauses; general.

In every contract in which data is specified to be delivered, insert the clause of § 9.203–1, except that this clause shall not be used in contracts (a) for the acquisition of existing works, in accordance with § 9.205, (b) wherein the clause of § 9.204 is used in accordance with the provisions of §§ 9.204–2 and 9.204–3, (c) utilizing DD Forms 1261 and 1270 or DD Form 1155, unless the contract is solely for the procurement of data, or (d) to be performed outside the United States, its Territories, or possessions, or Puerto Rico where the clause of § 9.206 applies. The additional sections of §§ 9.203–2, 9.203–3, and 9.203–4 will be added to the clause of § 9.203–1, in accordance with § 9.202 and the instructions contained in §§ 9.203–2, 9.203–3, and 9.203–4.

§ 9.203–1 Basic data clause.

DATA (MAR. 1960)

(a) The term "Subject Data" as used herein includes writings, sound recordings, pictorial reproductions, drawings or other graphical representations, and works of any similar nature (whether or not copyrighted) which are specified to be delivered under this contract. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) The Contractor agrees to and does hereby grant to the Government, and to its officers, agents, and employees acting within the scope of their official duties, a royalty-free, nonexclusive and irrevocable license throughout the world for Government purposes to publish, translate, reproduce, deliver, perform, dispose of, and to authorize others so to do, all Subject Data now or hereafter covered by copyright; *provided,* that with respect to the Subject Data now or hereafter covered by copyright and not originated in the performance of this contract, such license shall be only to the extent that the Contractor, its employees, or any individual or concern specifically employed or assigned by the Contractor to originate and prepare such Data under this contract, now has, or prior to completion or final settlement of this contract may acquire, the right to grant such license without becoming liable to pay compensation to others solely because of such grant.

(c) The Contractor shall exert all reasonable effort to advise the Contracting Officer, at the time of delivery of the Subject Data furnished under this contract, (i) of all invasions of the right of privacy contained therein and (ii) of all portions of such Data copied from work not composed or produced in the performance of this contract and not licensed under this clause.

(d) The Contractor shall report to the Contracting Officer, promptly and in reasonable written detail, each notice or claim of copyright infringement received by the Contractor with respect to all Subject Data delivered under this contract.

(e) Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or otherwise granted to the Government under any patent.

(f) Subject to the proviso of (b) above and unless otherwise limited below, the Government may duplicate, use, and disclose in any manner and for any purpose whatsoever, and have others so do, all Subject Data delivered under this contract.

(g) The Contractor recognizes that the Government, or a foreign government with funds derived through the Mutual Security Program or otherwise through the United States Government, may contract for property or services with respect to which the vendor may be liable to the Contractor for charges for the use of Subject Data on account of such a contract. The Contractor further recognizes that it is the policy of the Government not to pay in connection with its contracts, or to allow to be paid in connection with contracts made with funds derived through the Mutual Security Program or otherwise through the United States Government, charges for data which the Government has a right to use and disclose to others, or which is in the public domain, or with respect to which the Government has been placed in possession without restrictions upon its use and disclosure to others. This policy does not apply to reasonable reproduction, handling, mailing, and similar administrative costs incident to the furnishing of such data. In recognition of this policy, the Contractor agrees to participate in and make appropriate arrangements for the exclusion of such charges from such contracts or for the refund of amounts received by the Contractor with respect to any such charges not so excluded.

(h) Notwithstanding any provisions of this contract concerning inspection and acceptance, the Government shall have the right at any time to modify, remove, obliterate or ignore any marking not authorized by the terms of this contract on any piece of Subject Data furnished under this contract.

§ 9.203–2 Provision for addition to basic data clause for use in supply contracts.

The paragraph set forth below shall be added to the clause of § 9.203–1 in all supply contracts in which data is specified to be delivered. This paragraph shall not, however, be included in a contract having as one of its principal purposes experimental, developmental, or research work.

(i) Notwithstanding any Tables or Specifications included or incorporated in the contract by reference, "proprietary data" need not be furnished unless suitably identified in the Schedule of the contract as being required. For the purpose of this clause, "proprietary data" means data providing information concerning the details of a Contractor's secrets of manufacture, such as may be contained in but not limited to its manufacturing methods or processes, treatment and chemical composition of materials, plant layout and tooling, to the extent that such information is not disclosed by inspection or analysis of the product itself and to the extent that the Contractor has protected such information from unrestricted use by others. (Oct. 1958)

When "proprietary data" is to be obtained in accordance with § 9.202–1 (b) and the above paragraph is included in the contract, the Schedule of the contract will state the extent of the proprietary data to be furnished.

§ 9.203–3 Limited rights provision for addition to basic data clause.

The paragraph set forth below shall be added to the clause set forth in §§ 9.203–1 and 9.203–2 in negotiated contracts for supplies calling for "proprietary data" which is to be obtained subject to limitations on its use as provided for in § 9.202–2(b)(1) and the Schedule of the contract will state the extent of the "proprietary data" to be furnished subject to such limitations. This paragraph shall not be included in a contract having as one of its principal purposes experimental, developmental, or research work.

(j) That portion of the Subject Data delivered under this contract which is identified in the Schedule as being subject to limitations shall not be released outside the Government, nor be duplicated, used, or disclosed in whole or in part for procurement or manufacturing purposes (other than for manufacture required in connection with repair or overhaul where an item is not procurable commercially so as to enable the timely performance of the overhaul or repair work; *Provided,* When Data is released by the Government to a Contractor for such purposes, the release shall be made subject to the limitation of this clause; *Provided further,* Such Data shall not be used for manufacture or procurement of spare parts for stocks), without permission of the Contractor, if the following legend is marked on each piece of Data so limited either in its entirety or only partially as to its content:

Furnished under United States Government Contract No. ------ and only those portions hereof which are marked (for example, by circling, underscoring or otherwise) and indicated as being subject to this legend shall not be released outside the Government (except to foreign governments, subject to these same limitations), nor be disclosed, used, or duplicated, for procurement or manufacturing purposes, except as

otherwise authorized by contract, without the permission of _____. This legend shall be marked on any reproduction hereof in whole or in part.

Provided, That such Data may be delivered to foreign governments as the national interest of the United States may require, subject to the limitations specified in this paragraph. The Contractor shall not impose limitations on the use of any piece of Data, or any portion thereof which the Contractor has previously delivered to the Government without limitation. (June 1959)

§ 9.203–4 Provision for addition to basic data clause for use in contracts for experimental, developmental, or research work.

The paragraph set forth below shall be added to the clause of § 9.203–1 in every contract having as one of its principal purposes experimental, developmental, or research work and the Schedule of the contract will specify the data to be required in accordance with § 9.202–1 (c).

(i) Data need not be furnished for standard commercial items or services which are normally or have been sold or offered to the public commercially by any supplier and which are incorporated as component parts in or to be used with the product or process being developed if in lieu thereof identification of source and characteristics (including performance specifications, when necessary) sufficient to enable the Government to procure the part or an adequate substitute, are furnished; and further, proprietary data need not be furnished for other items which were developed at private expense and previously sold or offered for sale, including minor modifications thereof, which are incorporated as component parts in or to be used with the product or process being developed, if in lieu thereof the Contractor shall identify such other items and that "proprietary data" pertaining thereto which is necessary to enable reproduction or manufacture of the item or performance of the process. For the purpose of this clause "proprietary data" means data providing information concerning the details of a Contractor's secrets of manufacture, such as may be contained in but not limited to its manufacturing methods or processes, treatment and chemical composition of materials, plant layout and tooling, to the extent that such information is not disclosed by inspection or analysis of the product itself and to the extent that the Contractor has protected such information from unrestricted use by others. (Oct. 1958)

§ 9.204 Contract clauses; special.

§ 9.204–1 Limitation on Government's right of publication for sale to the general public.

The paragraph set forth below may be added to the clause of § 9.203–1 when, in contracts for research, the contracting officer determines in accordance with Departmental procedures that public dissemination of the work or certain designated parts of the work specified to be delivered under contract is in the best interest of the Government and would be facilitated by the Government relinquishing its right to publish for sale or to have others publish for sale for it. This paragraph shall not be used otherwise.

(__) If, after final settlement of this contract, and within the period designated in the Schedule* for the purpose of this paragraph (__) or otherwise approved by the Contracting Officer, but in any event within a period no greater than 24 months, the Contractor publishes for sale any Subject Data which are (i) designated in the Schedule* as being subject to this paragraph (__) and (ii) delivered under this contract, the Government agrees not to publish such Data for sale or authorize others so to do. This limitation on the Government's right to publish for sale any such Data so published by the Contractor shall continue as long as the Data are protected by copyright. As to all such Data not so published by the Contractor, this paragraph shall be of no force or effect. (Oct. 1958)

§ 9.204–2 Production of motion pictures.

The clause set forth below is approved for use in contracts for the production of motion pictures with or without accompanying sound, and in all contracts for the preparation of motion picture scripts, musical compositions, sound tracks, translations, adaptations, and the like:

RIGHTS IN DATA (JAN. 1958)

(a) The term "Subject Data" as used herein includes writings, sound recordings, pictorial reproductions, drawings or other graphical representations, and works of any similar nature (whether or not copyrighted) which are specified to be delivered under this contract. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) All Subject Data first produced in the performance of this contract shall be the sole property of the Government. The Contractor agrees not to assert any rights at common law or equity and not to establish any claim to statutory copyright in such Data. The Contractor shall not publish or reproduce such Data in whole or in part or in any manner or form, nor authorize others so to do, without the written consent of the Government until such time as the Government may have released such Data to the public.

(c) The Contractor agrees to grant and does hereby grant to the Government and to its officers, agents, and employees, acting within the scope of their official duties, a royalty-free, nonexclusive, and irrevocable license throughout the world (i) to publish, translate, reproduce, deliver, perform, use, and dispose of, in any manner, any and all Data not first produced or composed in the performance of this contract but which is incorporated in the work furnished under this contract; and (ii) to authorize others so to do.

(d) The Contractor shall indemnify and save and hold harmless the Government, its officers, agents and employees acting within the scope of their official duties against any liability, including costs and expenses, (i) for violation of proprietary rights, copyright or right of privacy, arising out of the publication, translation, reproduction, delivery, performance, use or disposition of any Data furnished under this contract, or (ii) based upon any libelous or other unlawful matter contained in such Data.

(e) Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(f) Paragraphs (c) and (d) above are not applicable to material furnished to the Contractor by the Government and incorporated in the work furnished under the contract: *Provided,* Such incorporated material is identified by the Contractor at the time of delivery of such work.

§ 9.204–3 Histories and other works.

The contract clause set forth in § 9.204–2 is suggested for use in contracts for—

(a) Histories of the respective Departments or services or units thereof;

(b) Works pertaining to recruiting, morale, training or career guidance;

(c) Surveys of Government establishments; and

(d) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties.

§ 9.205 Contracts for acquisition of existing works.

§ 9.205–1 Off-the-shelf purchase of books and similar items.

Notwithstanding the instructions of any other sections in this subpart, no contract clause contained in this subpart need be included in contracts for the separate, sole procurement of data, other than motion pictures, in the exact form in which such material exists prior to the initiation of a request for purchase (such as the off-the-shelf purchases of existing products) unless the right to reproduce such data is an objective of the contract.

§ 9.205–2 Contracts for existing motion pictures.

Contracts for the procurement of existing motion pictures or for the modification of existing motion pictures shall be made in accordance with Departmental procedures.

§ 9.206 Contracts to be performed outside the United States.

(a) Except as otherwise provided in § 9.204–2, § 9.204–3, or § 9.205, the clause set forth below shall be included in all contracts under which (1) technical information including reports, drawings, blueprints or other data is specified to be delivered to the Government, and (2) the work is to be performed outside the United States, its Territories, its possessions, or Puerto Rico, regardless of the place of delivery.

TECHNICAL INFORMATION (OCT. 1958)

The Government may duplicate, use, and disclose in any manner for its Government purposes, including delivery to other governments for the furtherance of mutual defense of the United States Government and such other governments, all or any part of the technical information including reports, drawings, blueprints, and other data specified to be delivered by the Contractor to the Government under this contract.

(b) The above clause may be modified by substituting "the United States Government" for "Government"; however, when the contractor is a foreign government, the above clause shall be modified by substituting "the United States Government" for "Government" and by substituting the name of the foreign government for "Contractor."

*The word "Schedule" may be replaced by the words "Task Order," or other appropriate reference, in accordance with Departmental procedures.

Subpart C—Foreign License and Technical Assistance Agreements

§ 9.301 General.

§ 9.301–1 Background.

In furtherance of the Mutual Security Program, or for other national defense purposes, the Government may undertake to develop or encourage the development of, foreign additional sources of supply. The development of such sources may be accomplished by an agreement, often called a foreign licensing agreement or technical assistance agreement, wherein a domestic concern, referred to in this part as a "primary source", agrees to furnish to a foreign concern or government, herein referred to as a "second source," foreign patent rights; technical assistance in the form of data, know-how, trained personnel of the primary source, instruction and guidance of the personnel of the second source, jigs, dies, fixtures, or other manufacturing aids; and such other assistance, information, rights, or licenses as are needed to enable the second source to produce particular supplies or perform particular services. Agreements calling for one or more of the foregoing may be entered into between the primary source and the Government, a foreign government, or a foreign concern. The consideration for providing such foreign licenses and technical assistance may be in the form of a lump sum payment, or payments for each item manufactured by the second source, or both, an agreement to exchange data and patent rights on improvements made to the article or service, capital stock transactions, or any combination of these. The primary source's bases for computing such consideration may include actual cost, charges for the use of patents, data, or know-how reflecting the primary source's investment in development and engineering and production techniques, and the primary source's "price" for setting up a second source. Such agreements often refer to the compensation to be paid as a royalty or license fee whether or not patent rights are involved.

§ 9.301–2 Policy.

It is Government policy not to pay in connection with its contracts, and not to be paid in connection with contracts made with funds derived through the Mutual Security Program or otherwise through the United States, charges for use of patents in which it holds a royalty-free license or charges for data which it has a right to use and disclose to others, or which is in the public domain, or which the Government has acquired without restriction upon its use and disclosure to others. This policy applies to foreign license and technical assistance agreements, first, in negotiating contract prices for foreign license and technical assistance contracts (§ 9.302) or supply contracts with second sources (§ 9.303), and second, in commenting on such agreements when they are referred to the Department of Defense by the Department of State pursuant to section 414 of the Mutual Security Act of 1954 and the International Traffic in Arms Regulations (§ 9.304).

§ 9.302 Foreign license and technical assistance contracts between the government and domestic concerns.

(a) Contracts between the Government and a primary source to provide technical assistance or patent rights to a second source for the manufacture of supplies or performance of services will, to the extent practicable, specify the rights in patents and data and any other rights to be supplied to the second source. Each contract shall provide in effect that, in connection with any separate agreement between the primary source (or any of its subcontractors) and the second source for patent rights or technical assistance relating to the articles or services involved in the contract, that:

(1) the primary source (and its subcontractors) will not make, on account of any purchases by the Government or by others with funds derived through the Mutual Security Program or otherwise through the Government, any charge to the second source (i) for royalties or amortization for patents or inventions in which the Government holds a royalty-free license, or (ii) for data which the Government has a right to possess, use, and disclose to others, or (iii) for any technical assistance provided to the second source for which the Government has paid under a contract between the Government and the primary source; and

(2) such separate agreement between the primary and second sources will conform to the requirements of the International Traffic in Arms Regulations (§ 9.304).

(b) The following factors, among others, shall be considered in negotiating the price to be paid the primary source under contracts within paragraph (a) of this section:

(1) The actual cost of providing data, personnel, manufacturing aids, samples, spare parts, etc.;

(2) The extent to which the Government has contributed to the development of the supplies or services, and to the methods of manufacture or performance, through past contracts for research and development or for manufacture of the supplies or performance of the services; and

(3) The Government's patent rights and rights in data relating to the supplies or services and to the methods of manufacture or of performance.

§ 9.303 Supply contracts between the government and second sources.

In negotiating contract prices with a second source, including the redetermination of contract prices, or in determining the allowability of costs under a cost-reimbursement type contract with a second source, the contracting officer:

(a) Shall obtain from the second source a detailed statement of royalties, license fees, or other compensation paid or to be paid to a primary source (or any of his subcontractors) for patent rights, rights in data, and other technical assistance provided to the second source, including identification and description of such patents, data, and technical assistance; and

(b) Shall not accept or allow charges which in effect are (1) for royalties or amortization for patents or inventions in which the Government holds a royalty-free license, or (2) for data which the Government has a right to possess, use, and disclose to others, or (3) for any technical assistance provided to the second source for which the Government has paid under a contract between the Government and a primary source.

§ 9.304 Foreign license and technical assistance agreements between domestic concern and foreign government or concern.

§ 9.304–1 International traffic in arms regulations.

Pursuant to section 414 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1934), the Department of State controls the exportation of data relating to articles designated in the United States Munitions List as arms, ammunition, or munitions of war. (The Munitions List and pertinent procedures are set forth in the International Traffic in Arms Regulations, 22 CFR, 121 et seq.) Before authorizing such exportation, the Department of State generally requests comments from the Department of Defense. Each Military Department will, on request of the Office of the Assistant Secretary of Defense (International Security Affairs), submit comments thereon as the basis for a Department of Defense reply to the Department of State. Such comments will be prepared in the light of the following excerpt from the International Traffic in Arm Regulations:

§ 124.3 *Required provisions in agreements.* (a) Proposed technical assistance or manufacturing license agreements which may involve the transfer or interchange of technical data (see §§ 121.8 and 121.9 of this chapter) should set out in detail the terms and conditions of such transfer or interchange and define in precise terms the following:

(1) The equipment and technology involved.

(2) The scope of the information to be furnished.

(3) The period of duration of the agreement.

(4) Statement of ownership.

(b) It is the general policy of the United States Government not to pay in connection with its purchases, or allow to be paid in connection with purchases made with Mutual Security Program funds, a charge for patent rights in which it holds a royalty-free license, or for technical data which it has a right to use and disclose to others for purposes of the Mutual Security Program, or which is in the public domain, or with respect to which it has been placed in possession without restriction upon its use and disclosure to others. Reasonable charges for reproduction, handling, mailing, and other similar administrative costs do not fall within this policy.

Pursuant to the above policy, agreements generally will not be approved unless written in such a way that (1) purchases of items by or for the United States Government or with funds derived through the Mutual Security Program, will not include a charge (a) for technical data in the possession of the United States Government, or in which the United States Government has a right to possession, and regarding which there is no prohibition against use by the United States Government and disclosure to others and (b) for royalties or amortization for patents or

inventions in which the United States Government holds a royalty-free license; and (2) the license rights transferred by such agreements will be subject to existing rights of the United States Government.

§ 9.304–2 Review of agreements.

(a) In reviewing foreign license and technical assistance agreements between domestic concerns and foreign governments or concerns, the Military Department concerned shall, insofar as its interests are involved, indicate whether the agreement meets the requirements of § 124.3 of the International Traffic in Arms Regulations (22 CFR 124.3) (§ 9.304–1) or in what respects it is deficient. Paragraphs (b) through (g) of this section provide general guidance for such review.

(b) Where it is reasonably anticipated that the Government will purchase from the second source the supplies and services involved in the agreement or that Mutual Security Program funds will be provided for the purchase of the supplies or services:

(1) It may suffice to fulfill the requirements of § 124.3(b) (22 CFR 124.3), quoted in § 9.304–1, so far as the Department of Defense is concerned, if:

(i) The agreement is so written that:

(*a*) The second source is required to advise the primary source when it has knowledge of any purchase made by or to be made from it by or for the Government or with funds derived through the Mutual Security Program or otherwise through the Government; and

(*b*) The second source agrees in the event of any such purchase to reflect in the purchase price of the article or service any reduction in the charges specified in the agreement, which is made by the primary source in respect to such purchase; and

(ii) The primary source agrees with the Government that upon advice to him from the second source, or from the Government or otherwise, as to any such purchase or prospective purchase, he will negotiate with the Department concerned an appropriate reduction in his charges to the second source in recognition of any Government rights in patents or data.

(2) If the agreement provides that no charge is being made to the second source for data or patent rights in which the Government has rights, or that no charge is being made to the extent of the Government's rights, the Department should:

(i) Before indicating its approval, evaluate the acceptability of such provision, or

(ii) Explicitly condition its approval on the right to evaluate the acceptability of such provision at a later appropriate time.

(c) Where it is reasonably anticipated that the Department will procure from the second source supplies or services involved in the agreement, or that Mutual Security Program funds will be provided for the procurement of the supplies or services:

(1) If the agreement specifies a reduction in charges thereunder, with respect to purchases by or for the Government or by others with funds derived through the Mutual Security Program or otherwise through the Government, in recognition of the Government's rights in patents and data, the Department should, before indicating its approval, evaluate the amount of the reduction to determine whether it is fair and reasonable in the circumstances.

(2) If the agreement does not specify any such reduction in charges or otherwise fails to give recognition to the Government's rights in the patents or data involved, a recommendation should be made, as a condition to approval, that the agreement be amended to reflect a reduction acceptable to the Government in any charge thereunder with respect to purchases made by or for the Government or by others with funds derived through the Mutual Security Program or otherwise through the Government, in accordance with § 124.3(b) (22 CFR 124.3), quoted in § 9.304–1.

(3) If the agreement provides that no charge is being made to the second source for data or patent rights in which the Government has rights, or that no charge is being made to the extent of the United States rights, the Department should, before indicating its approval, evaluate the acceptability of such provision.

(4) If time or circumstances do not permit the evaluation of the reduction in charges provided for in the agreement as called for in subparagraph (1) of this paragraph, or the specifying of such a reduction as called for in subparagraph (2) of this paragraph, or the evaluation of the provision that no charge is made as called for in subparagraph (3) of this paragraph, the guidance in paragraph (b) of this section may be followed.

(d) Where there is a technical assistance contract between the primary source and the Government related to the separate agreement between the primary and second sources that is under review, such separate agreement should reflect the arrangements contemplated with respect thereto by the Government's technical assistance contract.

(e) Every agreement should provide that any license rights transferred by the agreement are subject to existing rights of the Government.

(f) In connection with every agreement within paragraph (c) of this section, a request should be made to the primary source to identify the patents, data, and other technical assistance to be provided to the second source by the primary source or any of his subcontractors; to identify any such patents and data in which, to the knowledge of the primary source, the Government may have rights; and to segregate the charges made to the second source for each such category or item of patents, data, and other technical assistance. Reviewing personnel will verify or obtain such information from Governmental sources so far as practicable.

(g) The Department concerned should make clear that its approval of any agreement does not necessarily recognize the propriety of the charge or the amount thereof or constitute approval of any of the business arrangements in the agreement, unless the Department intends by its approval to commit itself to the fairness and reasonableness of a particular charge or charges. In any event, such a disclaimer should be made to charges or business terms not affecting either the Government or any purchase made with funds derived through the Mutual Security Program or otherwise through the Government.

PART 10—BONDS AND INSURANCE

Subpart A—Bonds

Sec.
10.101 Definitions.
10.101–1 Bid bond.
10.101–2 Performance bond.
10.101–3 Payment bond.
10.101–4 Advance payment bond.
10.101–5 Patent infringement bond.
10.101–6 Construction contract.
10.101–7 Annual bid bond.
10.101–8 Annual performance bond.
10.101–9 Consent of surety.
10.101–10 Penal sum or amount.
10.102 Bid bonds.
10.103 Performance bonds.
10.103–1 Performance bonds for contracts other than construction contracts.
10.103–2 Performance bonds in connection with construction contracts.
10.103–3 Annual performance bonds.
10.104 Payment bonds.
10.104–1 Payment bonds in connection with contracts other than construction contracts.
10.104–2 Payment bonds in connection with construction contracts.
10.104–3 Furnishing information to subcontractors and suppliers.
10.105 Advance payment bonds.
10.106 Patent infringement bonds.
10.107 Other types of bonds.
10.108 Execution and administration of bonds.

Subpart B—Sureties on Bonds

10.201 General requirements of sureties.
10.202 Options in lieu of sureties.
10.202–1 United States bonds or notes.
10.202–2 Certified or cashier's checks, bank drafts, money orders, or currency.
10.203 Consent of surety.

Subpart C—Insurance; General

10.300 Scope of subpart.
10.301 General.
10.302 Notice of cancellation or change.
10.303 Responsibility for loss of or damage to Government property.
10.304 Insurance against loss of or damage to Government property.
10.305 Procedures to be followed in the event of loss of or damage to Government property.

Subpart D—Insurance Under Fixed-Price Contracts

10.400 Scope of subpart.
10.401 Policy.
10.402 Government-furnished property.
10.403 Workmen's compensation insurance overseas.
10.404 Aircraft—Ground and Flight Risk.
10.404–1 Negotiated fixed-price type contracts.
10.404–2 Cost-reimbursement type contracts.

Subpart E—Insurance Under Cost-Reimbursement Type Contracts

Sec.
10.500 Scope of subpart.
10.501 Policy.
10.501–1 Workmen's compensation and employers' liability insurance.
10.501–2 General liability insurance.
10.501–3 Automobile liability insurance.
10.501–4 Aircraft public and passenger liability insurance.
10.501–5 Vessel collision liability and protection and indemnity liability insurance.
10.502 Self-insurance.
10.503 Government property.

Subpart F—Insurance of Industrial Facilities Under Leases or Facilities Contracts

10.600 Scope of subpart.
10.601 Responsibility for liabilities to third persons.
10.602 Responsibility for loss or damage to facilities.
10.602–1 Facilities contracts.
10.602–2 Leases.

Subpart G—Special Casualty Insurance Rating Plans

10.700 Scope of subpart.
10.701 Purpose of plans.
10.702 Description of plans.
10.703 Use and eligibility for plans.

AUTHORITY: §§ 10.001 to 10.703 issued under sec. 201, 55 Stat. 839, as amended, sec. 2202, 70A Stat. 120; 50 U. S. C. App. 611, 10 U. S. C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U. S. C. 2301–2314, E. O. 9001, 6 F. R. 6787, as amended by E. O. 9296, 8 F. R. 1429, 3 CFR, 1943 Cum. Supp.

Subpart A—Bonds

§ 10.101 Definitions.

As used in this subpart, the terms in §§ 10.101–1 to 10.101–6 shall have the meanings set forth therein.

§ 10.101–1 Bid bond.

A bid bond is a bond accompanying a bid in which the obligor obligates himself in an amount stated (the penal sum), which obligation, it is stated, is to be void if:

(a) The bid is not withdrawn after the opening within the period specified in the bid, or, if no shorter period is specified, within sixty days; and

(b) A written contract, with such bond or bonds as may be required, is executed within ten days after the prescribed forms are presented for signature.

§ 10.101–2 Performance bond.

A performance bond is a bond which is executed in connection with a contract and which secures the performance and fulfillment of all the undertakings, covenants, terms, conditions and agreements contained in the contract.

§ 10.101–3 Payment bond.

A payment bond is a bond which is executed in connection with a contract and which secures the payment of all persons supplying labor and material in the prosecution of the work provided for in the contract.

§ 10.101–4 Advance payment bond.

An advance payment bond is a bond which secures the performance and the fulfillment of a contractual provision for the making of advance payments.

§ 10.101–5 Patent infringement bond.

A patent infringement bond is a bond which secures the performance and fulfillment of the undertakings contained in a patent clause.

§ 10.101–6 Construction contract.

The term "construction contract" means any contract for the construction, alteration or repair of buildings, bridges, roads, or other kinds of real property. It does not include any contract for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property, regardless of the terms of any such contract as to payment or title.

§ 10.101–7 Annual bid bond.

An annual bid bond is a single bond (in lieu of separate bid bonds), without limitation as to penal amount, which secures all bids (on other than construction contracts) requiring bonds submitted by a contractor during a specific fiscal year of the Government in response to formal advertising.

§ 10.101–8 Annual performance bond.

An annual performance bond is a single bond (in lieu of separate performance bonds for each contract) which secures the performance of contracts (other than construction contracts) which require bonds and are entered into by a contractor during a specific fiscal year of the Government.

§ 10.101–9 Consent of surety.

A consent of surety is an acknowledgment by a surety that its bond given in connection with a contract continues to apply to the contract as modified.

§ 10.101–10 Penal sum or amount.

Penal sum or amount means the dollar amount shown in a bond and represents the maximum payment for which the surety is obligated.

§ 10.102 Bid bonds.

Bid bonds may be required when, and only when, the solicitation of bids for a contract to be entered into as a result of formal advertising specifies that the contract is to be supported by a performance bond or by performance and payment bonds. Whenever a bid bond is required, the penal sum thereof shall be not less than 20 percent of the bid price except that the maximum amount required shall be $3,000,000.

§ 10.103 Performance bonds.

§ 10.103–1 Performance bonds for contracts other than construction contracts.

(a) Generally performance bonds will not be required in connection with contracts other than construction contracts. Performance bonds will not be used as a substitute for determinations of contractor responsibility as required by Part 1, Subpart I of this subchapter.

(b) Subject to the general policy stated in paragraph (a) of this section, performance bonds may be required in individual procurements when, consistent with the following criteria, the contracting officer determines the need therefor. Justification for any such requirement must be fully documented.

(1) Where the terms of the contract provide for the contractor to have the use of Government material, property or funds and further provide for the handling thereof by the contractor in a specified manner so as to protect the Government's interests therein, a performance bond may be required.

(2) Where the circumstances applicable to a particular procurement are such that, for financial reasons, a performance bond is necessary to protect the interests of the Government. See for example, § 16.505–2(b)(3) of this chapter.

(c) Subject to the general policy stated in paragraph (a) of this section, determinations that performance bonds will be required in specified classes of cases (e.g., for particular types of supplies or services), may be made (1) for the Army, by the Deputy Chief of Staff for Logistics, (2) for the Navy, by the Chief of Naval Material, and (3) for the Air Force, by the Deputy Chief of Staff, Materiel. A copy of each such determination covering a class of cases shall be forwarded to the Office of Assistant Secretary of Defense (Supply and Logistics) for information.

(d) Performance bonds shall not be required unless the invitation for bids or request for proposals requires such a bond, or the requirement of such a bond is in the interest of the Government, and not prejudicial to other bidders. The requirement for a performance bond shall not be waived when the invitation for bids requires such bond.

(e) When the requirement for a performance bond is made by the terms of a contract, but the bond is not furnished by the contractor within the time specified, the contracting officer shall notify the contractor that the contract will be terminated for default if the bond is not furnished within the time specified in the contract clause providing for such termination (e.g., § 8.707(a)(2) of this chapter).

(f) Where a performance bond is required as a condition precedent to the formation of the contract, but is not furnished within the time specified, if the making of the award can be delayed without prejudice to other bidders and to the public interest, the contracting officer shall notify the bidder that if the bond is not furnished within 10 days (or such other period as the contracting officer may specify) after receipt of the notice, his bid will not be considered for award.

§ 10.103–2 Performance bonds in connection with construction contracts.

(a) Pursuant to the Miller Act, as amended (40 U. S. C. 270a.–270e.), in connection with any construction contract exceeding $2,000 in amount, except as provided in paragraph (c) of this section, a performance bond shall be required in a penal amount deemed adequate by the contracting officer for the protection of the Government. Generally, the penal amount of each performance bond shall be 100 percent of the contract price at the time of award. But where the contracting officer finds that to require a 100 percent performance bond would be disadvantageous to the Government, he may prescribe a lesser penal amount.

(b) Additional performance bond protection shall be required in connection with any modification effecting an increase in price under any contract for which a bond is required pursuant to paragraph (a) of this section if—

(1) The modification is for new or additional work which is beyond the scope of the existing contract; or

(2) The modification is pursuant to an existing provision of the contract and is expected to increase the contract price by $50,000 or 25 percent of the basic contract price, whichever is less.

The penal amount of the bond protection should generally be increased so that the total performance bond protection is 100 percent of the contract price as revised by (i) the modification requiring such additional protection, and (ii) the aggregate of any previous modifications: *Provided,* That lesser penal amounts may be authorized by the contracting officer as indicated in paragraph (a) of this section. The increased penal amount may be secured either by increasing the bond protection provided by the existing surety or sureties or by obtaining an additional performance bond from a new surety; but see § 10.203 with respect to requiring consent of surety.

(c) The Secretaries may waive for their respective Departments the requirement of a performance bond with respect to any or all cost-reimbursement type construction contracts. In addition, the contracting officer may waive the requirement for a performance bond for so much of the work under the contract as is to be performed in a foreign country: *Provided,* He finds that it is impracticable for the contractor to furnish such bond.

§ 10.103–3 Annual performance bonds.

Annual performance bonds may be used only in connection with contracts other than construction contracts. When such a bond is used and has been completely obligated in an amount equal to the penal sum thereof, an additional bond shall be obtained to cover additional contracts.

§ 10.104 Payment bonds.

§ 10.104–1 Payment bonds in connection with contracts other than construction contracts.

The extent to which payment bonds will be required in connection with contracts other than construction contracts shall be in accordance with procedures prescribed by each respective Department, except that the requirement of such a bond shall not be waived when an invitation for bids requires a payment bond. Conversely, a payment bond shall not be required unless (a) the solicitation of bids requires such a bond, or (b) requirement of such a bond is in the interest of the Government and not prejudicial to the other bidders. Whenever a payment bond is required, the penal sum thereof shall be in an amount deemed adequate by the Contracting Officer for the protection of the Government.

§ 10.104–2 Payment bonds in connection with construction contracts.

(a) Pursuant to the Miller Act, as amended (40 U. S. C. 270a–270e), in connection with any construction contract exceeding $2,000 in amount, except as provided in paragraph (c) of this section, a payment bond shall be required in a penal amount as follows:

(1) When the contract price is not more than $1,000,000, the penal sum shall be 50 percent of the contract price;

(2) When the contract price is more than $1,000,000 but not more than $5,000,000, the penal sum shall be 40 percent of the contract price; and

(3) When the contract price is more than $5,000,000, the penal sum shall be $2,500,000.

(b) Additional payment bond protection shall be required in connection with any modification effecting an increase in price under any contract for which a bond is required pursuant to paragraph (a) of this section if—

(1) The modification is for new or additional work which is beyond the scope of the existing contract; or

(2) The modification is pursuant to an existing provision of the contract and is expected to increase the contract price by $50,000 or 25 percent of the basic contract price, whichever is less.

The penal amount of the additional bond protection should generally be such that the total payment bond protection is 50 percent of the contract price as revised by (i) the modification requiring such additional protection, and (ii) the aggregate of any previous modifications: *Provided,* That when the contract price as so revised is more than $1,000,000 but not more than $5,000,000, the total payment bond protection shall be in a penal amount of 40 percent of the revised contract price: *Provided further,* That when the contract price as so revised is more than $5,000,000, the total payment bond protection shall be in the penal amount of $2,500,000. The additional protection may be secured either by increasing the bond protection provided by the existing surety or sureties or by obtaining an additional payment bond from a new surety; but see § 10.203 with respect to requiring consent of surety.

(c) The Secretaries may waive for their respective Departments the requirement of a payment bond with respect to any or all cost-reimbursement type construction contracts. In addition, the contracting officer may waive the requirement for a payment bond for so much of the work under the contract as is to be performed in a foreign country: *Provided,* He finds that it is impracticable for the contractor to furnish such bonds.

§ 10.104–3 Furnishing information to subcontractors and suppliers.

It is Department of Defense policy to furnish subcontractors or suppliers only general information with respect to the status of work and of payments made to prime contractors. Where a payment bond has been required, a subcontractor or supplier, after satisfying the contracting officer that he is a bona fide subcontractor or supplier and stating that he has not been paid for work performed or supplies delivered, may be furnished the name and address of the surety furnishing the required bonds on the contract in question. In addition, subcontractors and suppliers may be furnished general information on such matters as the progress of the work, the accomplishment of payments as of certain dates, and the estimated percentage of completion.

§ 10.105 Advance payment bonds.

The extent to which advance payment bonds will be required shall be in accordance with procedures prescribed by each respective Department. Whenever such a bond is required, the penal sum thereof shall be in an amount deemed adequate by the Contracting Officer for the protection of the Government.

§ 10.106 Patent infringement bonds.

Patent infringement bonds shall be required only in connection with contracts containing provision for patent indemnity, and then only if a performance bond has not been executed and if the financial responsibility of the contractor is unknown or doubtful. Whenever such a bond is required, the penal sum thereof shall be in an amount deemed adequate by the Contracting Officer for the protection of the Government.

§ 10.107 Other types of bonds.

Other types of bonds may be used only when, in the opinion of the head of the procuring activity concerned, such bonds are necessary or desirable in connection with the procurement of particular supplies or services.

§ 10.108 Execution and administration of bonds.

The forms and provisions of bonds, and their preparation, execution and administration, shall be in accordance with the provisions of this subchapter and with procedures prescribed by each respective Department.

Subpart B—Sureties on Bonds

§ 10.201 General requirements of sureties.

Every bond required or used in connection with the procurement of supplies or services shall be supported by good and sufficient surety (corporate or individual) in accordance with procedures prescribed by each respective Department.

§ 10.202 Options in lieu of sureties.

Any one or more of the following types of security listed below may be deposited by the contractor in lieu of furnishing corporate or individual sureties on bonds. Any such security accepted by the contracting officer shall be promptly turned over to the disbursing officer concerned for Army and Navy contracts, and to the accounting and finance officer concerned for Air Force contracts, or when United States bonds or notes are involved they shall be deposited as provided in § 10.202–1. Any such security or its equivalent shall be returned to the contractor when the obligation of the bond has by its terms ceased.

§ 10.202–1 United States bonds or notes.

In accordance with the provisions of the Act of February 24, 1919, as amended (6 U.S.C. 15) and Treasury Department Circular No. 154 (February 6, 1935), any person required to furnish a bond has the option, in lieu of furnishing surety or sureties thereon, of depositing United States bonds or notes in an amount equal at their par value to the penal sum of the bond, together with an agreement authorizing the collection or sale of such United States bonds or notes in the event of default on the penal bond. The contracting officer may turn these securities over to the disbursing officer or accounting and finance officer as provided in § 10.202, or deposit them with the Treasurer of the United States, a Federal Reserve Bank, branch Federal Reserve Bank having the requisite facilities, or other depositary duly designated for that purpose by the Secretary of the Treasury, under procedures prescribed by the Department concerned and Treasury Department Circular No. 154. However, the contracting officer shall deposit with the Treasurer of the United States all such bonds and notes received by him in the District of Columbia.

§ 10.202–2 Certified or cashier's checks, bank drafts, money orders, or currency.

Any person required to furnish a bond has the option, in lieu of furnishing surety or sureties thereon, of depositing a certified or cashier's check, a bank draft, a Post Office money order, or currence, in an amount equal to the penal sum of the bond: *Provided*, That the penal sum of the bond is not in excess of $50,000 Certified or cashier's checks, bank drafts, or Post Office money orders shall be drawn to the order of the Treasurer of the United States.

§ 10. 203 Consent of surety.

In connection with any amendment, modification or supplemental agreement which would otherwise effect the release of a surety, or in any other situation as prescribed by each respective Department, the Contracting Officer shall obtain the written consent thereto of the surety or sureties on the existing bond or bonds notwithstanding the fact that there may be an additional bond supported by a new surety: *Provided*, That no such consent need be obtained if there is an increased or additional bond supported by the same surety or sureties.

Subpart C—Insurance; General

§ 10.300 Scope of subpart.

This subpart sets forth the general principles and policy applicable to insurance under contracts of the Departments for supplies or services.

§ 10.301 General.

Insurance will be required where (a) it is mandatory by law, (b) it is considered desirable to utilize the facilities and services of the insurance industry, or (c) in special instances it is deemed necessary or desirable in connection with the performance of a contract. The respective Departments may also authorize or require the purchase of insurance where commingling of property or the conditions of the contract make the carrying of insurance reasonably necessary for the protection of the several interests concerned.

§ 10.302 Notice of cancellation or change.

Where insurance is required by contract provision or in writing by the approving authority, the policies evidencing such insurance shall contain an endorsement to the effect that cancellation or material change in the policies, adversely affecting the interest of the Government in such insurance, shall not be effective unless the written notice as required by the approving authority is given.

§ 10.303 Responsibility for loss of or damage to Government property.

The responsibility of the Contractor for loss of or damage to Government property in the possession or control of Contractors is set forth in the clause in §§ 13.411, 13.502, and 13.503 of this subchapter.

§ 10.304 Insurance against loss of or damage to Government property.

In instances where insurance is required or approved to cover loss of or damage to Government property, such insurance may be provided either by specific insurance policies or by inclusion of such risks in the Contractor's existing insurance policies. In either event, the insurance policies shall make formal disclosure of the Government's interest in the property.

§ 10.305 Procedures to be followed in the event of loss of or damage to Government property.

Upon the happening of loss of or damage to any Government property, concerning which the Contractor is relieved of responsibility by contract provision, the procedure shall be as prescribed in subparagraph (f)(3) of the clause in § 13.502 or § 13.503 of this subchapter.

Subpart D—Insurance Under Fixed-Price Contracts

§ 10.400 Scope of subpart.

This subpart sets forth the policy of the Departments with respect to insurance under fixed-price contracts for supplies or services.

§ 10.401 Policy.

Ordinarily the Departments are not concerned with the insurance programs of fixed-price Contractors. However, the Departments may be concerned with a Contractor's insurance program when special circumstances exist. Examples of special circumstances are (a) where the Contractor is engaged principally in Government work, (b) where the Contractor has a segregated operation which is engaged principally in Government work, (c) where Government-furnished property is involved, (d) where the work is performed within a Government establishment, and (e) where the Government may desire to assume risks for which the Contractor ordinarily obtains commercial insurance.

§ 10.402 Government-furnished property.

The Contractor's responsibilities for loss of or damage to Government-furnished property under fixed-price contracts are set forth in the clause in § 13.502 of this subchapter.

§ 10.403 Workmen's compensation insurance overseas.

(a) The Defense Base Act, as amended (42 U.S.C. 1651 et seq.), extends the ap-

plication of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901) to various classes of employees engaged in work outside the United States, including any employee engaged (1) in the performance of a public work contract or (2) in the performance of any contract approved or financed pursuant to the Mutual Security Act as amended (22 U.S.C. 1871 et seq.) other than (i) contracts approved or financed by the Development Loan Fund, or (ii) contracts exclusively for the furnishing of materials or supplies. As used in this paragraph, a "public work" contract includes any contract for a fixed improvement or any project whether or not fixed, involving construction, alteration, removal or repair for the public use of the United States or its allies, including projects or operations under service contracts and projects in connection with the national defense or with war activities, dredging, harbor improvements, dams, roadways, and housing, as well as preparatory and ancillary work in connection therewith at the site or on the project. The following clause shall be included in all public work contracts to be performed outside the United States:

WORKMEN'S COMPENSATION INSURANCE (DEFENSE BASE ACT) (JAN. 1960)

The Contractor before commencing performance under this contract shall provide and thereafter maintain such Workmen's Compensation Insurance or security as is required by the Defense Base Act, as amended (42 U.S.C. 1651). The Contractor further agrees to insert in all subcontracts hereunder to which the Defense Base Act is applicable, a clause similar to this clause, including this sentence, imposing on all such subcontractors a like requirement to comply with the Defense Base Act.

(b) Upon the recommendation of the secretary concerned, the Secretary of Labor may waive the applicability of the Defense Base Act with respect to any contract, subcontract, or subordinate contract, work location, or classification of employees.

§ 10.404 Aircraft—Ground and Flight Risk.

§ 10.404–1 Negotiated fixed-price type contracts.

(a) Negotiated fixed-price type contracts for the production, modification, maintenance, or overhaul of aircraft shall, except as provided in paragraph (b) of this section include the following clause.

GROUND AND FLIGHT RISK (MAY 1960)

(a) Notwithstanding any other provisions of this contract, except as may be specifically provided in the Schedule as an exception to this clause, the Government, subject to the definitions and limitations of this clause, assumes the risk of damage to, or loss or destruction of, aircraft "in the open," during "operation," and in "flight," as these terms are defined below, and agrees that the Contractor shall not be liable to the Government for any such damage, loss, or destruction, the risk of which is so assumed by the Government.

(b) For the purposes of this clause:

(i) Unless otherwise specifically provided in the Schedule, the term "aircraft" means—

(A) Aircraft (including (I) complete aircraft, and (II) aircraft in the course of being manufactured, disassembled, or reassembled: *Provided,* That an engine or a portion of a wing or a wing is attached to a fuselage of such aircraft) to be furnished to the Government under this contract (whether before or after acceptance by the Government); and

(B) Aircraft (regardless of whether in a state of disassembly or reassembly) furnished by the Government to the Contractor under this contract;

including all property installed therein, or in the process of installation, or temporarily removed from such aircraft: *Provided, however,* That such aircraft and property are not covered by a separate bailment agreement.

(ii) The term "in the open" means located wholly outside of buildings on the Contractor's premises or at such other places as may be described in the Schedule as being in the open for the purposes of this clause, except that aircraft furnished by the Government shall be deemed to be in the open at all times while in Contractor's possession, care, custody, or control.

(iii) The term "flight" means any flight demonstration, flight test, taxi test, or other flight, made in the performance of this contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the _____[1] With respect to land based aircraft, "flight" shall commence with the taxi roll from a flight line on the Contractor's premises, and continue until the aircraft has completed the taxi roll in returning to a flight line on the Contractor's premises; with respect to seaplanes, "flight" shall commence with the launching from a ramp on the Contractor's premises and continue until the aircraft has completed its landing run upon return and is beached at a ramp on the Contractor's premises; with respect to helicopters, "flight" shall commence upon engagement of the rotors for the purpose of take-off from the Contractor's premises and continue until the aircraft has returned to the ground on the Contractor's premises and the rotors are disengaged; and with respect to vertical take-off aircraft, "flight" shall commence upon disengagement from any launching platform or device on the Contractor's premises and continue until the aircraft has been re-engaged to any launching platform or device on the Contractor's premises: *Provided, however,* That aircraft off the Contractor's premises shall be deemed to be in flight when on the ground or water only during periods of reasonable duration following emergency landings, other landings made in the performance of this contract, or landings approved by _____[1] in writing.

(iv) The term "Contractor's premises" means those premises designated as such in the Schedule or in writing by the _____,[1] and any other place to which aircraft are moved for the purpose of safeguarding the aircraft.

(v) The term "operation" means operations and tests, other than on any production line, of aircraft, when not in flight, whether or not the aircraft is in the open or in motion during the making of any such operations or tests, and includes operations and tests of equipment, accessories, and power plants, only when installed in aircraft.

(vi) The term "flight crew members" means those persons in the aircraft who have been designated by the Contractor to conduct any flight as defined in subparagraph (iii) above on behalf of the Contractor.

(c) (1) The Government's assumption of risk under this clause, as to aircraft in the open, shall continue in effect unless terminated pursuant to subparagraph (3) below. Where the _____[1] finds that any of such aircraft is in the open under unreasonable conditions, he shall notify the Contractor in writing of the conditions he finds to be unreasonable and require the Contractor to correct such conditions within a reasonable time.

(2) Upon receipt of such notice, the Contractor shall act promptly to correct such conditions, regardless of whether it agrees that such conditions are in fact unreasonable. To the extent that the Contracting Officer may later determine that such conditions were not in fact unreasonable, an equitable adjustment shall be made in the contract price to compensate the Contractor for any additional costs it incurred in correcting such conditions and the contract shall be modified in writing accordingly. Any dispute as to the unreasonableness of such conditions or the equitable adjustment shall be deemed to be a dispute concerning a question of the fact within the meaning of the clause of this contract entitled "Disputes."

(3) If the _____[1] finds that the Contractor has failed to act promptly to correct such conditions or has failed to correct such conditions within a reasonable time, he may terminate the Government's assumption of risk under this clause, as to any of the aircraft which is in the open under such conditions, such termination to be effective at 12:01 a.m. on the fifteenth day following the day of receipt by the Contractor of written notice thereof. If the Contracting Officer later determines that the Contractor acted promptly to correct such conditions or that the time taken by the Contractor was not in fact unreasonable, an equitable adjustment shall, notwithstanding paragraph (f) of this clause, be made in the contract price to compensate the Contractor for any additional costs he incurred as a result of termination of the Government's assumption of risk under this clause and the contract shall be modified in writing accordingly. Any dispute as to whether the Contractor failed to act promptly to correct such conditions, or as to the reasonableness of the time for correction of such conditions, or as to such equitable adjustment, shall be deemed to be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(4) In the event the Government's assumption of risk under this clause is terminated in accordance with (3) above, the risk of loss with respect to Government-furnished property shall be determined in accordance with the clause of this contract, if any, entitled "Government-Furnished Property" until the Government's assumption of risk is reinstated in accordance with (5) below.

(5) When unreasonable conditions have been corrected, the Contractor shall promptly notify the Government thereof. The Government may elect to again assume the risks and relieve the Contractor of liabilities as provided in this clause, or not, and the _____[1] shall notify the Contractor of the Government's election. If, after correction of the unreasonable conditions, the Government elects to again assume such risks and relieve the Contractor of such liabilities, the Contractor shall be entitled to an equitable adjustment in the contract price for costs of insurance, if any, extending from the end of the third working day after the Contractor notifies the Government of such correction until the Government notifies the Contractor of such election. If the Government elects not to again assume such risks, and such conditions have in fact been corrected, the Contractor shall be entitled to an equitable adjustment

[1] In the foregoing clause, insert, in contracts of the Department of the Army and the Department of the Air Force, the words "the Contracting Officer," and insert, in contracts of the Department of the Navy, the activity designated in accordance with Departmental procedures.

for costs of insurance, if any, extending after such third working day.

(d) The Government's assumption of risk shall not extend to damage to, or loss or destruction of, such aircraft:

(i) Resulting from failure of the Contractor, due to willful misconduct or lack of good faith of any of the Contractor's managerial personnel, to maintain and administer a program for the protection and preservation of aircraft in the open, and during operation, in accordance with sound industrial practice (the term "Contractor's managerial personnel" means the Contractor's directors, officers, and any of its managers, superintendents, or other equivalent representatives, who has supervision or direction of all or substantially all of the Contractor's business, or all or substantially all of the Contractor's operations at any one plant or separate location at which this contract is performed, or a separate and complete major industrial operation in connection with the performance of this contract);

(ii) sustained during flight if the flight crew members conducting such flight have not been approved in writing by the _____;[2]

(iii) While in the course of transportation by rail, or by conveyance on public streets, highways, or waterways, except for Government-furnished property;

(iv) To the extent that such damage, loss or destruction is in fact covered by insurance;

(v) Consisting of wear and tear, deterioration (including rust and corrosion), freezing, or mechanical, structural, or electrical breakdown or failure, unless such damage is the result of other loss, damage, or destruction covered by this clause; *provided*, however, in the case of Government-furnished property, if such damage consists of reasonable wear and tear or deterioration, or results from inherent vice in such property, this exclusion shall not apply;

(vi) Sustained while the aircraft is being worked upon and directly resulting therefrom, including but not limited to any repairing, adjusting, servicing or maintenance operation, unless such damage, loss, or destruction is of a type which would be covered by insurance which would customarily have been maintained by the Contractor at the time of such damage, loss, or destruction, but for the Government's assumption of risk under this clause; or

(vii) Under this clause, where the total loss resulting from each event separately occurring is less than $500.

[2] Insert, in contracts of the Department of the Army, the words "the Contracting Officer," and insert, in contracts of the Department of Navy or the Department of the Air Force, the activity designated in accordance with Departmental procedures.

(e) A subcontractor shall not be relieved from liability for damage to, or loss or destruction of, aircraft while in its possession or control, except to the extent that the subcontract, with the prior written approval of the Contracting Officer, provides for relief of the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of such aircraft in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of this contract. Where a subcontractor has not been relieved from liability for any damage, loss, or destruction of aircraft and any damage, loss, or destruction occurs, the Contractor shall enforce the liability of the subcontractor for such damage to, or loss or destruction of, the aircraft for the benefit of the Government.

(f) The Contractor warrants that the contract price does not and will not include, except as may be otherwise authorized in this clause, any charge or contingency reserve for insurance (including self-insurance funds or reserves) covering any damage to, or loss or destruction of, aircraft while in the open, during operation, or in flight, the risk of which has been assumed by the Government under the provisions of this clause, whether or not such assumption may be terminated as to aircraft in the open.

(g) In the event of damage to, or loss or destruction of, aircraft in the open, during operation, or in flight, the Contractor shall take all reasonable steps to protect such aircraft from further damage, separate damaged and undamaged aircraft, put all aircraft in the best possible order and, further, except in cases covered by (d) (vii) above, the Contractor should furnish to the _____[1] a statement of:

(i) The damaged, lost, or destroyed aircraft;

(ii) The time and origin of the damage, loss, or destruction;

(iii) All known interests in commingled property of which aircraft are a part; and

(iv) The insurance, if any, covering any part of the interest in such commingled property.

Except in cases covered by (d) (vii) above, an equitable adjustment shall be made in the amount due under this contract for expenditures made by the Contractor in performing his obligations under this paragraph (g) and this contract shall be modified in writing accordingly.

[1] In the foregoing clause, insert, in contracts of the Department of the Army and the Department of the Air Force, the words "the Contracting Officer," and insert, in contracts of the Department of the Navy, the activity designated in accordance with Departmental procedures.

(h) If prior to delivery and acceptance by the Government any aircraft is damaged, lost, or destroyed and the Government has under this clause assumed the risk of such damage, loss, or destruction, the Government shall either (1) require that such aircraft be replaced or restored by the Contractor to the condition in which it was immediately prior to such damage, or (2) shall terminate this contract with respect to such aircraft. In the event that the Government requires that the aircraft be replaced or restored, an equitable adjustment shall be made in the amount due under this contract and in the time required for its performance, and this contract shall be modified in writing accordingly. If, in the alternative, this contract is terminated under this paragraph with respect to such aircraft and under this clause the Government has assumed the risk of such damage, loss, or destruction, the Contractor shall be paid the contract price for said aircraft (or, if applicable, any work to be performed on said aircraft) less such amounts as the Contracting Officer determines (1) that it would have cost the contractor to complete the aircraft (or any work to be performed on said aircraft) together with anticipated profit, if any, on any such uncompleted work, and (2) to be the value, if any, of the damaged aircraft or any remaining portion thereof retained by the Contractor. The Contracting Officer shall have the right to prescribe the manner of disposition of the damaged, lost, or destroyed aircraft, or any remaining parts thereof; and, if any additional costs of such disposition are incurred by the Contractor, a further equitable adjustment will be made in the amount due to the Contractor. Failure of the parties to agree upon an equitable adjustment or upon the amount to be paid in the event of termination of the contract with respect to any aircraft, shall be a dispute concerning a question of fact within the meaning of the Disputes clause of this contract.

(i) In the event the Contractor is at any time reimbursed or compensated by any third person for any damage, loss, or destruction of any aircraft, the risk of which has been assumed by the Government under the provisions of this clause and for which the Contractor has been compensated by the Government, he shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any such damage, loss, or destruction and, upon the request of the _____,[1] shall at the Government's expense furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment or subrogation in favor of the Government) in obtaining recovery.

(b) (1) In paragraph (b) of the foregoing clause, certain of the defined terms may be modified by insertion of appropriate additional definitions in the Schedule in accordance with the following. The purpose of the clause is to have the Government assume risks which generally entail unusually high insurance premiums and which are not covered by the contractor's "contents," "work-in-process," or other similar insurance. It is recognized that all of the definitions prescribed in the foregoing clause may not cover all situations which should be covered if the above purpose is to be accomplished. Therefore, changes may be effected in the Schedule as set forth below.

(i) Since the standard definition of "aircraft" contemplates conventional types of winged aircraft, a modified definition is necessary if the contract covers helicopters, vertical take-off aircraft, lighter-than-air airships or other non-conventional types of aircraft. The modified definition should take into consideration that the aircraft has reached a point of manufacture comparable to that required in the standard definition;

(ii) The definition of "in the open" may be modified to include "hush houses," test hangars, and comparable structures, and other designated areas;

(iii) "Contractor's premises" shall be expressly defined in the Schedule and shall be limited to those locations where aircraft, as defined in the above clause, may be located during and for the performance of the contract. "Contractor's premises" may include, but are not limited to, premises owned or leased by the contractor or premises as to which the contractor has a permit, license, or other right of use either exclusively or jointly with others, including Government airfields.

(2) The Government need not assume the risk of damage to, or loss or destruction of, aircraft, as provided by the foregoing clause, if the best estimate of premium costs to be included in the contract price for insurance coverage for such damage, loss, or destruction at any plant or facility is less than $500. If it is determined not to assume such risks, the foregoing clause shall not be made a part of the contract.

(3) Subparagraph (d) (iii) of the above clause may be varied to provide for Government assumption of risk of transportation by conveyance on streets or highways where the contracting officer determines that such transportation is

limited to the vicinity of the contractor's premises and is merely an incident to work being performed under the contract.

§ 10.404–2 Cost-reimbursement type contracts.

(a) Cost-reimbursement type contracts for the development, production, modification, maintenance, or overhaul of aircraft, or otherwise involving the furnishing of aircraft to the contractor by the Government, shall, except as provided in (b) of this section, include the following clause.

FLIGHT RISKS (MAY 1960)

(a) Notwithstanding any other provision of this contract, and particularly subparagraph (f)(1) of the Government Property clause, and paragraph (c) of the Insurance-Liability to Third Persons clause, the Contractor shall not (i) be relieved of liability for, damage to, or loss or destruction of, aircraft sustained during flight, or (ii) be reimbursed for liabilities to third persons for loss of or damage to property, or for death or bodily injury, which are caused by aircraft during flight, unless the flight crew members have previously been approved in writing by _____.[1]

(b) For the purposes of this clause:

(i) Unless otherwise specifically provided in the Schedule, the term "aircraft" means any aircraft, whether furnished by the Contractor under this contract or furnished by the Government to the Contractor under this contract, including all Government Property placed or installed therein or attached thereto.

(ii) The term "flight" means any flight demonstration, flight test, taxi test, or other flight, made in the performance of this contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the _____.[2] As to land based aircraft, "flight" shall commence with the taxi roll from a flight line and continue until the aircraft has completed the taxi roll to a flight line; as to sea planes, "flight" shall commence with the launching from a ramp and continue until the aircraft has completed its landing run and is beached at a ramp; as to helicopters, "flight" shall commence upon engagement of the rotors for the purpose of take-off and continue until the aircraft has returned to the ground and rotors are disengaged; and for vertical take-off aircraft "flight" shall commence upon disengagement from any launching platform or device and continue until the aircraft has been re-engaged to any launching platform or device.

(iii) The term "flight crew members" means those persons in the aircraft who have been designated by the Contractor to conduct any flight, as defined in subparagraph (ii) above, on behalf of the Contractor.

(b) In the foregoing clause, the definition of "aircraft" may be appropriately modified in the Schedule if the contract covers helicopter, vertical takeoff aircraft, lighter-than-air airships, or other nonconventional types of aircraft. If the contract includes the Government Property clause in § 13.506 of this chapter, the reference in paragraph (a) of the foregoing clause to paragraph (f)(1) of the Government Property clause should be changed to (i)(1).

[1] Insert, in contracts of the Department of the Army, the words "the Contracting Officer," and insert, in contracts of the Department of Navy or the Department of the Air Force, the activity designated in accordance with Departmental procedures.

[2] Insert, in contracts of the Department of the Army or the Department of the Air Force, the words "the Contracting Officer," and insert, in contracts of the Department of the Navy, the activity designated in accordance with Departmental procedures.

Subpart E—Insurance Under Cost-Reimbursement Type Contracts

§ 10.500 Scope of subpart.

This subpart sets forth the policy of the Departments with respect to insurance under cost-reimbursement type contracts for supplies or services.

§ 10.501 Policy.

The kinds of insurance listed in this subpart, with limits of liability as prescribed by each respective Department, shall ordinarily be required under cost-reimbursement type contracts and under those subcontracts where the provisions of the prime contract are extended to the subcontract. A program of self-insurance approved by the Department concerned, as provided in § 10.502, may be substituted for any of the kinds of insurance ordinarily required.

§ 10.501–1 Workman's compensation and employers' liability insurance.

Compliance with applicable workmen's compensation and occupational disease statutes will be required, and the insurance policy will also include employers' liability coverage, where available. In jurisdictions where all occupational diseases are not compensable under applicable law, insurance for occupational diseases will be required under the employers' liability section of the insurance policy; however, such additional insurance will not be required where contract operations are commingled with the contractor's commercial operations so that it would be impracticable to require such coverage. The clause set forth in § 10.403 shall be included in all construction contracts, as defined in § 10.101–6, to be performed outside the United States.

§ 10.501–2 General liability insurance.

Bodily injury liability insurance will be required on the compresensive form of policy. Property damage liability insurance will be required only in special circumstances as determined by the Departments concerned. Property damage liability insurance may be approved when the nature of the contract operations warrant its purchase or where they are not separable from the Contractor's commercial operations.

§ 10.501–3 Automobile liability insurance.

This insurance will be required on the comprehensive form of policy and will provide for bodily injury liability and property damage laibility covering the operation of all automobiles used in connection with the performance of the contract.

§ 10.501–4 Aircraft public and passenger liability insurance.

Where aircraft are used in connection with the performance of the contract, such insurance ordinarily will be considered required coverage.

§ 10.501–5 Vessel collision liability and protection and indemnity liability insurance.

Where vessels are used in connection with the performance of the contract, such insurance will be required whenever deemed necessary by the Department concerned.

§ 10.502 Self-insurance.

Qualified programs of self-insurance covering any kind of risk may be approved where an examination of the program indicates that its application to the cost-reimbursement type contract is in the best interests of the Government. However, a program of self-insurance for workmen's compensation in any jurisdiction where workmen's compensation does not completely cover employers' liability to employees may be approved only if:

(a) The contractor also maintains an approved program of self-insurance for any employers' liability which is not so covered, or

(b) The contractor shows that the combined cost to the Government of self-insurance for workmen's compensation and commercial insurance for employers' liability will not exceed the cost of covering both kinds of risks by commercial insurance.

§ 10.503 Government property.

The Contractor's responsibilities for loss of or damage to Government property under cost-reimbursement-type contracts are set forth in the clause in § 13.503 of this subchapter.

Subpart F—Insurance of Industrial Facilities Under Leases or Facilities Contracts

§ 10.600 Scope of subpart.

This subpart sets forth the policy with respect to insurance of industrial facilities under a facilities contract or under a lease made pursuant to 10 U.S.C. 2667.

§ 10.601 Responsibility for liabilities to third persons.

Where industrial facilities are provided by the Government under a facilities contract or a lease, the contract or lease shall require that during the period of construction, installation, alteration, repair, or use, and at any other time as directed by the Department concerned, the contractor or lessee shall insure or otherwise provide approved security for liabilities to third persons (including employees of the contractor or lessee) in the same manner and to the same extent as required in § 10.501.

§ 10.602 Responsibility for loss or damage to facilities.

§ 10.602–1 Facilities contracts.

Section 13.411 of this chapter defines the responsibilities of the contractor for loss or damage to Government facilities. Therefore, facilities contracts shall provide that the contractor shall not include the cost of insurance in any contract except to the extent of insurance required or approved by the Department

concerned. If a facilities contract does not restrict the use of the facilities to work performed for the Government, provision shall be made that the contractor shall procure and maintain insurance as the Department concerned may require against loss or damage to the industrial facilities.

§ 10.602–2 Leases.

(a) Where facilities are leased pursuant to 10 U.S.C. 2667, the Government may, consistent with the policies of § 13.411 of this chapter, require the lessee to provide and maintain insurance against loss or damage to the facilities. In any event the lease shall provide that:

(1) The lessee shall provide, maintain, change, or discontinue such insurance, as the Government may from time to time require: *Provided,* That the lessee's liability for loss or damage to the facilities is modified accordingly;

(2) If any insurance requirement is changed pursuant to (1) above, an equitable adjustment in the rent shall be made so as to reflect any resulting savings or increased costs to the lessee; and

(3) The lessee shall notify the Department concerned whenever the use of the facilities in the performance of Government contracts changes so as to become 75 percent or more of the total productive capacity thereof, and conversely whenever such use changes so as to become less than 75 percent of such capacity.

(b) Generally, whenever more than 75 percent of the total productive capacity of the facilities will be used for a substantial period of time in the performance of Government contracts and the insurance costs are significant, or whenever it is deemed to be in the best interest of the Government, the Department concerned will, consistent with the policies of § 13.411, relieve the lessee from liability for loss or damage to the facilities and eliminate any requirement for insurance relating thereto. Conversely, whenever less than 75 percent of such capacity will be so used, or whenever it is deemed to be in the best interest of the Government, the Department concerned will require the lessee to be responsible for loss or damage to the facilities and provide and maintain appropriate insurance. In such cases an equitable adjustment shall be made in the rent. In determining when the Government shall so modify the responsibilities of the lessee, the percentage of use shall not be regarded as an absolute standard, but rather as an important factor to be considered.

Subpart G—Special Casualty Insurance Rating Plans

§ 10.700 Scope of subpart.

This subpart sets forth principles and requirements for use of the National Defense Projects Rating Plan, which is available for application on both domestic and foreign contracts which meet the eligibility requirements set forth herein. This part likewise applies to the World War II War Department Insurance Rating Plan, also known as the War Projects Insurance Rating Plan, which is currently available for application only outside the United States. These plans provide a special rating formula for the purchase of the casualty insurance coverages listed in §§ 10.501–1 through 10.501–3, and are mandatory as to contracts which meet the use and eligibility standards set forth in § 10.703. Inclusion under the prime contractor's Rating Plan policies of similar coverages for subcontractors, whose contracts with the prime contractor provide that the insurance shall be furnished by the prime contractor, shall be automatic if the subcontract operations are at the project site, unless the military departments specifically direct otherwise. Subcontractors whose operations are away from the projects site will not be covered under the prime contractor's Rating Plan policies unless the prime contractor is specifically directed by the military departments to request inclusion of such subcontractors.

§ 10.701 Purpose of plans.

These plans are designed to utilize the services and organizations of the insurance industry for safety engineering and the handling of claims arising under eligible contracts at a minimum cost to the Government.

§ 10.702 Description of plans.

These plans are effected by endorsements attached to standard insurance policy forms for workmen's compensation, employer's liability, general liability, and automobile liability. The Rating Plans provide for a fixed deposit premium, for a reduced rate of current premium payments, for yearly adjustments of the premium depending upon loss experience during the period, and for final adjustment of the premium based upon the experience of the entire period covered by the policies. The final adjustment may be deferred for a maximum of 68 months after expiration of the policies. The total adjusted premium is the sum of the following:

(a) A fixed charge which is a percentage of the standard premium and is to compensate the insurance company for general expenses other than those referred to hereafter;

(b) Modified losses, which are the losses paid or incurred, multiplied by a conversion factor of 1.12 to compensate the insurance company for the claim department expense;

(c) Allocated claims expenses, which are expenses for claims services not of the type ordinarily rendered by the insurer's claim department, such as actual expenditures for attorney's fees and other trial or hearing expenses in connection with litigated cases;

(d) Special assessments imposed by the applicable jurisdiction for purposes such as second injury funds, rehabilitation funds, maintenance of workmen's compensation commissions, etc.; and

(e) Actual premium taxes.

Each of the above adjustments are subject to review by authorized representatives of the Department concerned, and the total adjusted premium derived therefrom cannot exceed a maximum premium which is a percentage of the standard premium developed by use of manual rates issued or approved by the appropriate rating organization. In general, the plans are variations of commercially available insurance rating plans, but have been specially developed to meet the requirements of the Departments.

§ 10.703 Use and eligibility for plans.

The Rating Plans described in this subpart shall be applied to all eligible defense projects where such application is determined by the Department concerned to be in the best interests of the Government. The Rating Plans may be applied to cost-reimbursement type contracts and also, in appropriate cases, to fixed-price contracts with price redetermination provisions. A defense project is eligible for application of a plan when (a) eligible Government contracts represent, at inception of the plan, at least 90 percent of the payroll for total operations at the specific locations of the project, and (b) the annual premium for insurance is estimated to be at least $10,000. A defense project may include contracts awarded by more than one Department to the same Contractor.

PART 11—FEDERAL, STATE AND LOCAL TAXES

Sec.
11.000 Scope of part.

Subpart A—Federal Excise Taxes

11.101 Retailers excise taxes.
11.101–1 General.
11.101–2 Jewelry and related items.
11.101–3 Furs.
11.101–4 Toilet preparations.
11.101–5 Luggage and handbags.
11.101–6 Special fuels.
11.102 Manufacturers excise taxes.
11.102–1 General.
11.102–2 Motor vehicles.
11.102–3 Tires and tubes.
11.102–4 Gasoline.
11.102–5 Lubricating oils.
11.102–6 Household type equipment.
11.102–7 Radio and television receiving sets, phonographs and records.
11.102–8 Musical instruments.
11.102–9 Sporting goods.
11.102–10 Photographic equipment.
11.102–11 Firearms, shells, and cartridges.
11.102–12 Business machines.
11.102–13 Pens, mechanical pencils, and lighters.
11.102–14 Matches.
11.103 Excise taxes on facilities and services.
11.104 Use tax on highway motor vehicles.

Subpart B—Exemptions From Federal Excise Taxes

11.201 Retailers excise taxes.
11.202 Manufacturers excise taxes.
11.203 Supplies and services for the exclusive use of the United States.
11.204 Exemptions from other Federal taxes.
11.205 Tax exemption forms.

Subpart C—State and Local Taxes

11.301 Applicability.
11.302 Tax exemption forms.

Subpart D—Contract Clauses

11.401 Fixed-price type contracts.
11.401–1 Clause for advertised and certain negotiated contracts.
11.401–2 Alternate clause for certain negotiated contracts.
11.402 Cost-reimbursement type contracts.
11.403 Foreign tax exemption clauses.
11.403–1 General.
11.403–2 Contract clauses.
11.404 Clause for use where foreign tax agreements do not apply.

AUTHORITY: §§ 11.000 to 11.402 issued under R.S. 161, sec. 2202, 70A Stat. 120; 5 U.S.C. 22, 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314.

§ 11.000 Scope of part.

This part deals with Federal taxes imposed by the Internal Revenue Code upon certain supplies and services procured by any Department; exemptions from such Federal taxes; policy for obtaining exemption from State and local taxes; and contract clauses required or authorized for insertion in contracts. Except as otherwise indicated references are to the Internal Revenue Code of 1954 (26 U.S.C.). Subparts A and B of this part are only for general information of Government personnel. Reference should be made to the Internal Revenue Code and the applicable tax regulations, which may be amended from time to time, for guidance before taking action on any question involving taxes.

Subpart A—Federal Excise Taxes

§ 11.101 Retailers excise taxes.

§ 11.101–1 General.

Chapter 31 of the Internal Revenue Code imposes retailers excise taxes upon various types of articles, sold at retail. The tax is not imposed on sales for resale. The sale of taxable articles to the Government for use or consumption is a taxable retail sale. A lease of supplies is treated as a sale for the purpose of these taxes. In general, the tax attaches when title passes from the seller. The amount of tax is based on the sale price or the amount of rental payment. The sale price or rental payment for the purpose of computing the tax excludes:

(a) Whether or not separately stated, the retailers excise tax;

(b) If separately stated, any retail sales tax imposed by any State, Territory, or political subdivision thereof, or the District of Columbia, whether liability for such tax is imposed on the vendor or vendee; and

(c) All other service charges such as for transportation, delivery, insurance, and installation;

But includes any charges for packaging or packaging materials. If, after the tax has been paid, the sale price is adjusted for any reason, such as by discount, rebate, allowance, or return of containers, the amount of the tax applicable to such sale price also shall be adjusted by credit or refund. The retailer, in turn, is entitled to a refund or credit from the Internal Revenue Service for such tax adjustment.

§ 11.101–2 Jewelry and related items.

A tax of 10 percent of the sales price is imposed upon the following articles sold at retail: all articles commonly or commercially known as jewelry, whether real or imitation; certain specifically listed stones, whether real or synthetic; articles made of, ornamented, mounted, or fitted with precious metals or imitations thereof; watches, clocks, cases and movements therefor; gold, goldplated, silver, or sterling flatware or hollowware and silver-plate hollowware (which excludes silver-plated flatware); opera glasses, lorgnettes; and marine glasses, field glasses, and binoculars except those which, because of their size or weight, are ordinarily mounted on tripods or other bases. This tax does not apply to (a) articles used for religious purposes; (b) surgical and dental instruments; (c) frames or mountings for eyeglasses; (d) fountain pens, mechanical pencils, or smokers' pipes if the only parts of such articles which consist of precious metals are essential parts not used for ornamentation; (e) watches designed especially for the blind; (f) watches, clocks, cases and movements previously subjected to manufacturers tax or constituting a part of a nontaxable control or regulatory device; (g) or to buttons, insignia, and any other devices prescribed for use with the uniforms of the Armed Forces. Where the manufacturers excise tax has been imposed on a pen, mechanical pencil, or cigarette lighter, which is further processed so as to make it subject to the retailers excise tax on jewelry, the retailer, in computing the retailers excise tax due on the sale, is entitled to a credit or refund in the amount of the manufacturers excise tax paid on the article.

§ 11.101–3 Furs.

A tax of 10 percent of the sales price is imposed upon the following articles sold at retail: articles made of fur on the hide or pelt, and articles of which such fur is the component of chief value, i.e., its value is more than three times that of the next most valuable component material. The tax is not imposed upon the sale of raw fur. If the fur on the hide or pelt is supplied to a dresser or dyer of fur skins or a manufacturer or repairer of fur articles, who produces a taxable article for the use of the supplier of the fur, the transaction is deemed to be a sale at retail and is subject to the tax.

§ 11.101–4 Toilet preparations.

A tax of 10 percent of the sales price is imposed upon toilet preparations sold at retail and any other similar substance, article, or preparation by whatsoever name known which is used or applied, or intended to be used or applied for toilet purposes, but not including any article intended to be used or applied only in the care of babies, or to sales for use in barber shops and beauty parlors.

§ 11.101–5 Luggage and handbags.

A tax of 10 percent of the sales price is imposed upon certain specifically listed articles (including fittings or accessories sold therewith) sold at retail such as: luggage, handbags, cases, kits and similar items for use in carrying toilet articles or wearing apparel.

§ 11.101–6 Special fuels.

(a) *Diesel fuel.* A tax at the indicated rates is imposed upon diesel fuel, other than that taxable as gasoline under section 4081 of the Internal Revenue Code (see § 11.102–4), which is (*a*) sold by any person to an owner, lessee, or other operator of a diesel-powered highway vehicle, for use as a fuel in such vehicle, or (*b*) used by any person as a fuel in a diesel-powered highway vehicle unless there was a taxable sale of such liquid pursuant to (*a*) above, as follows:

(1) At 3 cents per gallon, if sold for use or if used as fuel in a diesel-powered highway vehicle:

(i) Which, at the time of such sale or use, is registered, or is required to be registered, for highway use under the laws of any State or foreign country; or

(ii) Which, if owned by the United States, is used on the highway; or

(2) At 2 cents per gallon, if sold for use or if used as fuel in a diesel-powered highway vehicle:

(i) Which, at the time of such sale or use, is not registered, and is not required to be registered, for highway use under the laws of any State or foreign country; or

(ii) Which, if owned by the United States, is not used on the highway; and

(3) At an additional 1 cent per gal-

lon, if fuel on which a tax of 2 cents was paid pursuant to (2) above, is used as fuel in a diesel-powered highway vehicle:

(i) Which, at the time of such use, is registered, or is required to be registered, for highway use under the laws of any State or foreign country; or

(ii) Which, if owned by the United States, is used on the highway.

No tax is imposed on diesel fuel sold for use or used as fuel in a nonhighway vehicle, such as certain military vehicles, construction equipment, and equipment designed for use at mines, factories, railroad stations, and farms.

(b) *Special motor fuels.* A tax at the rates indicated below is imposed upon benzol, benzene, naphtha, liquefied petroleum gas, or any other liquid (other than kerosene, gas oil, fuel oil, or a product taxable as diesel fuel under paragraph (a) of this section, or as gasoline under section 4081 of the Internal Revenue Code (see § 11.102–4)), which is (*a*) sold by any person to an owner, lessee, or other operator of a motor vehicle, motorboat, or airplane for use as a fuel for the propulsion thereof, or (*b*) used by any person as a fuel for the propulsion of a motor vehicle, motorboat, or airplane, unless there was a taxable sale of such liquid pursuant to (*a*) above, as follows:

(1) At 3 cents per gallon, if such liquid is sold for use or is used as a fuel for a highway vehicle:

(i) Which, at the time of such sale or use, is registered, or is required to be registered, for highway use under the laws of any State or foreign country; or

(ii) Which, if owned by the United States, is used on the highway, or

(2) At 2 cents per gallon, if such liquid is sold for use or is used as a fuel for the propulsion of a motorboat or airplane, or a motor vehicle:

(i) Which, at the time of such sale or use, is not registered, and is not required to be registered, for highway use under the laws of any State or foreign country; or

(ii) Which, if owned by the United States, is not used on the highway; and

(3) At an additional 1 cent per gallon, if a liquid on which a tax of 2 cents was paid pursuant to (2) above, is used as fuel in a highway vehicle:

(i) Which, at the time of such use, is registered, or required to be registered, for highway use under the laws of any State or foreign country; or

(ii) Which, if owned by the United States is used on the highway.

(c) *Refunds and credits.* (1) A retailer, who has paid a tax on diesel fuel or special motor fuel, is entitled to a refund or credit of the tax paid, if such retailer has not included the tax in the sales price or otherwise collected the tax from the purchaser, has repaid the tax to the purchaser, or has the purchaser's written consent to take the refund or credit, as follows:

(i) A refund or credit of 3 cents or 2 cents per gallon, as appropriate, if a liquid upon which a tax of either 3 cents or 2 cents per gallon has been paid, is not used as fuel in a diesel-powered highway vehicle or to propel a motor vehicle, motorboat, or airplane;

(ii) A refund or credit of 1 cent per gallon, if diesel fuel, upon which a tax of 3 cents per gallon has been paid pursuant to paragraph (a) (1) of this section, is used as a fuel for a diesel-powered highway vehicle:

(*a*) Which, at the time of such use is not registered, and is not required to be registered, for highway use under the laws of any State or foreign country; or

(*b*) Which, if owned by the United States, is not used on the highway; or

(iii) A refund of 1 cent per gallon, if special motor fuel, upon which a tax of 3 cents per gallon has been paid pursuant to paragraph (b) (1) of this section, is used to propel a motorboat or airplane, or motor vehicle:

(*a*) Which, at the time of such use is not registered, and is not required to be registered, for highway use under the laws of any State or foreign country; or

(*b*) Which, if owned by the United States, is not used on the highway.

These refunds or credits shall be utilized, in accordance with Departmental procedures, by adjustment of the contract price whenever it is economically advantageous to do so.

(2) If the manufacturers excise tax on gasoline (see § 11.102–4) has been paid on any material used in the production of a special motor fuel taxable under paragraph (b) of this section, the manufacturer of the gasoline is entitled to a refund or credit of such tax, subject to the conditions similar to those stated in the opening lines of subparagraph (1) of this paragraph. The contract price for special motor fuels purchased by any Department shall not include an amount for manufacturers excise tax on gasoline used in the production of such special motor fuel.

§ 11.102 Manufacturers excise taxes.

§ 11.102–1 General.

Chapter 32 of the Internal Revenue Code imposes manufacturers excise taxes upon various types of supplies sold by a manufacturer, producer, or importer. In general, the tax attaches when title passes from the manufacturer. The amount of the tax is based on the amount of the sale price. A lease of supplies is treated as a sale for the purpose of these taxes, in which event the tax is measured by the rental payments until such payments equal the price or fair value of the article (but see § 11.102–12 with respect to lease of business machines by the Government). The sale price or rental payment excludes the tax itself and all service charges connected with the sale, such as transportation, delivery, insurance, or installation charges. However, charges for packaging materials are included. If, after the tax has been paid, the sale price is adjusted for any reason, such as by discount, rebate, allowance, or return of containers, the amount of the tax applicable to such sale price also should be adjusted. The manufacturer, in turn, is entitled to a refund or credit from the Internal Revenue Service for such tax adjustment. Articles subject to the retailers excise tax on jewelry (see § 11.101–2) are not subject to manufacturers excise taxes, except any clock or watch, or any case or movement for a clock or watch, sold as a part or accessory, or sold on or in connection with or with the sale of any article. Supplies of native Indian handicraft manufactured or produced by Indians on Indian reservations, or in Indian schools, or by Indians under the jurisdiction of the United States Government in Alaska are not subject to manufacturers excise taxes.

§ 11.102–2 Motor vehicles.

A tax at the rates indicated below is imposed upon the following articles (including parts and accessories sold therewith) sold by a manufacturer, producer, or importer:

(a) Chassis and bodies of trucks, buses, truck and bus trailers and semitrailers, and tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer—10 percent; except that this tax does not apply to equipment designed for off-the-road use, such as certain military vehicles, construction equipment, and equipment designed for use at mines, factories, railroad stations, and farms;

(b) Chassis and bodies of automobiles, and of trailers and semitrailers (other than house trailers) suitable for use with passenger automobiles—10 percent through June 30, 1960, and 7 percent thereafter; and

(c) Parts or accessories—when sold separately from an automobile, truck, or other item taxable as indicated in paragraphs (a) and (b) of this section—8 percent through June 30, 1960 and 5 percent thereafter. Parts or accessories are defined to include any article—

(1) The primary use of which is to improve, repair, replace or serve as a component part of a motor vehicle;

(2) Designed to be attached to or used in connection with a motor vehicle or to add to its utility or ornamentation; or

(3) The primary use of which is in connection with a motor vehicle whether or not essential to its operation or use.

Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, a taxable motor vehicle are treated as parts or accessories whether or not primarily adapted for such use. However, the term "parts or accessories" does not include tires, inner tubes, or automobile radio and television receivers. The tax on parts or accessories does not apply to any article sold for use (or for a single resale for use) as material in the manufacture of, or as a component part of any article whether or not such article is subject to a manufacturers excise tax. The contract price of supplies purchased by any Department shall not include an amount for the manufacturers excise tax on automotive parts or accessories purchased for use in the manufacture of any article.

§ 11.102–3 Tires and tubes.

(a) A tax at the rates indicated below is imposed on the following supplies, made wholly or in part of rubber, including synthetic and substitute rubber,

sold by a manufacturer, producer, or importer:

(1) Tires of the type used on highway vehicles, which includes motor vehicles which are highway vehicles, and vehicles of the type used with motor vehicles which are highway vehicles—8 cents per pound;

(2) Other tires, which include pneumatic and solid tires, casings, hoops, strips, and bands of all kinds which are designed to fit the wheel of any type of vehicle that is capable of transporting a person or burden—5 cents per pound;

(3) Inner tubes, which include any type of air container for pneumatic tires—9 cents per pound on total weight, including air valves and stem; and

(4) Tread rubber, which includes any material commonly or commercially known as tread rubber or camelback of a type used in retreading or recapping tires—3 cents per pound. An exemption exists for the sale of tread rubber or camelback by a manufacturer to a purchaser for use by that purchaser other than for recapping or retreading tires of the type used on highway vehicles. In addition, if tread rubber, upon which the tax has been paid, is sold for use or is used other than for recapping or retreading tires of the type used on highway vehicles, the manufacturer is entitled to a refund or credit of the tax: *Provided*, That the credit under (b) below is not available. The contract price for supplies purchased by any Department will not include an amount for the manufacturers excise tax on tread rubber to the extent that this exemption or refund or credit is available to the manufacturer. In determining weight of taxable tires under subparagraphs (1) and (2) of this paragraph, metal rims or rim bases are excluded, but any other material or fastening device that forms a part of the tire is included. The tax imposed under subparagraph (1) and (2) of this paragraph, does not apply to tires which are not more than 20 inches in diameter, and not more than 1¾ inches in cross section, if such tires are of all-rubber construction without fabric or metal reinforcement, nor does it apply to tires of extruded tiring with an internal wire fastening agent.

(b) The exemption for sales for further manufacture does not apply to taxable tires and tubes (see § 11.203). However, if tax-paid tires and tubes normally sold in connection with the sale by a manufacturer of a taxable motor vehicle are sold therewith, a credit against the tax on the motor vehicle is allowed to the extent of the motor vehicle tax rate applied to the manufacturers purchase price on the tires and tubes. The contract price for supplies purchased by any Department should not include an amount for manufacturers excise tax on tires and tubes to the extent that this credit is available to the manufacturer.

§ 11.102–4 Gasoline.

(a) A tax of 3 cents per gallon is imposed on gasoline sold by a producer or importer. Gasoline means all products commonly or commercially known as gasoline, including casinghead and natural gasoline, but excluding kerosene, gas oil, or fuel oil, and also excluding any product taxable as a special motor fuel under section 4041 of the Internal Revenue Code (see § 11.101–6). The tax does not apply to the sale of gasoline to a producer, which is defined to include a refiner, compounder, blender, or dealer who sells gasoline exclusively to producers of gasoline.

(b) The ultimate purchaser of gasoline is entitled to a refund of 1 cent per gallon for gasoline used otherwise than as fuel in a highway vehicle; for example, gasoline used in stationary engines, in cleaning tools, in motorboats, aircraft, fork lift trucks, bulldozers and earth movers. Refunds will also be made on gasoline used as fuel in a highway vehicle:

(1) Which, at the time of such use is not registered, nor required to be registered, for highway use under the laws of any State or foreign country; or

(2) Which, if owned by the United States is not used on the highway. In accordance with Departmental procedures, necessary data shall be compiled, to the extent economically advantageous, to support a direct application to the Internal Revenue Service for refund. Such application shall be in accord with pertinent requirements of the Internal Revenue Service.

§ 11.102–5 Lubricating oils.

(a) A tax at the indicated rates is imposed upon the following classes of lubricating oils sold, other than to another manufacturer or producer for resale, by a manufacturer or producer (but not upon oil sold by an importer):

(1) Cutting oils, which means oils sold for use in cutting and machining operations, including forging, drawings, rolling, shearing, punching, and stamping on metals—3 cents per gallon; and

(2) Other lubricating oils, which means all oils, regardless of origin, which are sold as lubricating oil or are suitable for use as a lubricant, not including products commonly known as grease—6 cents per gallon. Certain products, other than those commonly known as grease, are not considered to be lubricating oils, and accordingly are not subject to the tax. These include petrolatum, and fatty oils of vegetable, animal, fish, and marine origin which in their natural state are not sold as lubricating oils.

(b) An exemption is available for lubricating oils sold by a manufacturer directly to a purchaser who uses the oil for nonlubricating purposes. In applying this exemption, oils can be grouped into two classes:

(1) Oils which are exempted if the manufacturer obtains an exemption certificate from the purchaser in the form prescribed by the Treasury Regulations; and

(2) Oils which are exempted without an exemption certificate. Oils of the second class include crude neatsfoot oil; electrical transformer insulating oil; white oil; and lubricating oils which are packaged in sealed containers of one gallon or less, labeled and sold for nonlubricating purposes.

With the exception of oils which are packaged in sealed containers of one gallon or less, labeled and sold for nonlubricating purposes, oils of neither class may be sold tax-free to dealers for resale even though it is known that the oil will be used for nonlubricating purposes. If, however, oil upon which a tax has been paid is used for nonlubricating purposes, the manufacturer is entitled to a refund or credit, irrespective of whether the oil was sold directly to the consumer by the manufacturer or was sold through a dealer. A refund or credit is also allowed when lubricating oil, upon which the 6 cent per gallon tax has been paid, is used as a cutting oil taxable at 3 cents per gallon. When it is economically advantageous to do so, the exemption or refund or credit for oil sold for use or used for nonlubricating purposes, and the refund or credit for lubricating oil used as a cutting oil, shall be utilized in accordance with Departmental procedures by a tax exclusive purchase or by adjustment of the contract price.

§ 11.102–6 Household type equipment.

A tax at the rates indicated below is imposed upon the following supplies (including parts or accessories sold therewith) sold by a manufacturer, producer, or importer:

(a) Household type refrigerators, which include units not exceeding 14 cubic feet net storage space for single or multiple cabinet installations having, or designed for use with, a mechanical refrigerating unit operated by electricity, gas, kerosene, or gasoline; household type units for the quick freezing or frozen storage of foods operated by electricity, gas, kerosene, or gasoline—5 percent.

(b) Self-contained air-conditioning units—10 percent.

(c) Electric, gas and oil appliances—5 percent.

(d) Electric light bulbs and tubes, not subject to any other manufacturers tax—10 percent.

§ 11.102–7 Radio and television receiving sets, phonographs and records.

A tax of 10 percent is imposed upon the following articles (including parts and accessories sold therewith) sold by a manufacturer, producer, or importer:

(a) Radio and television receiving sets, automobile radio and television receiving sets, phonographs, and combinations of any of the foregoing, unless such articles are communication, detection or navigation equipment of the type used in commercial, military or marine installations. The contract price of any of these articles to be used for communication, detection or navigational purposes delivered to any Department shall not include any amount for the manufacturers excise tax, irrespective of the date of the contract, if the contract price is subject to adjustment for changes in the contractor's Federal excise tax burden. The exemption of sales for further manufacture does not apply to automobile radio and television receivers (see § 11.203); however, if tax-paid receivers are sold in connection with the sale by a manufacturer of a taxable motor vehicle, a credit against the tax on the motor vehicle is allowed to the extent of the motor vehicle tax rate applied to the

manufacturer's purchase price on the receiver; and

(b) Radio and television components, which means chassis, cabinets, tubes, speakers, amplifiers, power supply units, antennae of the built-in-type, phonograph mechanism and phonograph record players unless such articles are suitable for use only on or in connection with, or as a component part of, any communication, detection or navigation equipment. Exemption from the tax is available as to taxable components—which are sold for use, or are actually used as material in the manufacture of, or as a component part of, any article, whether or not such article is subject to a manufacturer's excise tax. The contract price for articles purchased by any Department shall not include an amount for the manufacturers excise tax on radio and television components if this exemption is available to the manufacturer.

§ 11.102–8 Musical instruments.

A tax of 10 percent is imposed upon musical instruments sold by a manufacturer, producer, or importer. The tax does not apply to musical instruments sold to a religious institution for exclusively religious purposes.

§ 11.102–9 Sporting goods.

A tax of 10 percent is imposed upon certain types of sporting equipment (including parts or accessories sold therewith) sold by a manufacturer, producer, or importer.

§ 11.102–10 Photographic equipment.

A tax at the rates indicated below is imposed upon the following articles (including parts or accessories sold therewith) sold by a manufacturer, producer, or importer:

(a) Cameras, not including X-ray cameras or cameras weighing more than four pounds exclusive of lens and accessories—10 percent;

(b) Camera lenses, not including still camera lenses having a focal length of more than 120 millimeters or motion picture lenses having a focal length of more than 30 millimeters—10 percent. Exemption from the tax is available as to camera lenses which are sold for use or are actually used as material in the manufacture of, or as a component part of any article, whether or not such article is subject to a manufacturers excise tax. The contract price for supplies purchased by any Military Department shall not include an amount for the manufacturers excise tax on camera lenses if this exemption is available to the manufacturer;

(c) Unexposed photographic film in rolls, including motion picture film—10 percent. This tax does not apply to X-ray film; unperforated microfilm; film more than 150 feet in length; or film more than 25 feet in length and more than 30 millimeters in width. A person who acquires unexposed film in a form not subject to tax and thereafter sells such unexposed film in form and dimensions subject to tax is treated as a manufacturer of the film so sold by him. The manufacturer of unexposed motion picture films is entitled to a credit or refund (but not an exemption) for film used or resold for use in making newsreel motion picture films covering current news events for immediate release for public exhibition; and

(d) Electric motion or still picture projectors of the household type—5 percent.

§ 11.102–11 Firearms, shells, and cartridges.

Although a tax is imposed upon pistols and revolvers at the rate of 10 percent, and other firearms, shells, and cartridges at the rate of 11 percent, sold by a manufacturer, producer, or importer, it does not attach to the sale or transfer of such articles purchased with funds appropriated for the Military Departments. In addition to this manufacturers excise tax, Chapter 53A of the Internal Revenue Code imposes a transfer tax and a tax on the manufacture of machine guns and certain other firearms, except that transfer to, or manufacture for, the United States is specifically exempted from these taxes.

§ 11.102–12 Business machines.

A tax of 10 percent is imposed upon a wide variety of business machines (including parts or accessories sold therewith), not including cash registers of the type used in registering over-the-counter retail sales or stencil cutting machines of the type used in shipping departments in making cutout stencils for marking freight shipments, sold by a manufacturer, producer, or importer. However, the Secretary of the Treasury has authorized an exemption effective 1 January 1959 on any payment made under leases of business machines directly to the United States for its exclusive use: *Provided,* That there is included in the lease agreement a statement to the effect that this "agreement is a lease of business machines directly to the United States for its exclusive use and qualifies for exemption under the order of the Secretary of the Treasury dated April 20, 1959, authorized by section 4293 of the Internal Revenue Code of 1954." To qualify for the exemption the lease agreement must be entered into by an officer or employee of the United States who is authorized to execute contracts for and on behalf of the United States.

§ 11.102–13 Pens, mechanical pencils, and lighters.

A tax of 10 percent is imposed upon fountain and ball point pens, mechanical pencils, and mechanical lighters for cigarettes, cigars, and pipes, sold by a manufacturer, producer, or importer; except that this tax does not apply if the article also is subject to the retailers excise tax on jewelry imposed by section 4001 of the Internal Revenue Code. If the manufacturers excise tax has been paid, but the article is further processed so as to subject it to the retailers excise tax, the retailer (but not the manufacturer who originally paid the tax) is entitled to a credit to the extent of the manufacturers excise tax paid on the article (see § 11.101–2).

§ 11.102–14 Matches.

A tax of 2 cents per 1,000, not to exceed 10 percent of the price for which sold, is imposed upon matches sold by a manufacturer, producer, or importer, except that the rate is 5½ cents per 1,000 for fancy wooden matches or matches having a stained, dyed, or colored stick or stem, whether packed in boxes or in bulk.

§ 11.103 Excise taxes on facilities and services.

Chapter 33 of the Internal Revenue Code imposes excise taxes on certain facilities and service, including admissions, dues, communications, transportation and safe deposit boxes. In general, the tax is based on the amount paid for the service, and is imposed upon the person paying for the service.

§ 11.104 Use tax on highway motor vehicles.

(a) A tax of $1.50 a year for each 1,000 pounds of taxable gross weight, or fraction thereof, is imposed upon the use of any highway motor vehicle which, together with semitrailers and trailers customarily used in connection with a vehicle of this type, has a taxable gross weight in excess of 26,000 pounds. The full tax is due for any vehicle which is used on the public highways of the United States at any time during the month of July, irrespective whether the vehicle is later removed from highway use. If the first use of a taxable vehicle occurs after the end of July, the tax is computed proportionately from the first day of the month in which the vehicle is first used, through the end of the following June. For example, if a vehicle is placed in use during August, 11/12 of the total tax is payable. No tax applies to vehicles, even though of a highway type, which are never used on the public highways during the taxable year.

(b) Taxable gross weight is the sum of:

(1) The actual unloaded weight of the vehicle and any semitrailers and trailers customarily used with such a vehicle, all units fully equipped for service; and

(2) The weight of the maximum load customarily carried by all units of a vehicle of this type.

(c) The tax is payable by the person in whose name the vehicle is, or is required to be, registered under the law of any State, or if owned by the United States, by the agency or instrumentality of the United States operating such vehicle. If a tax has been paid for a particular vehicle, no further liability can be incurred in the same taxable year, even though there is a change of ownership of the vehicle.

(d) The Secretary of the Treasury has authorized an exemption for vehicles used by the United States whether or not they are Government owned.

Subpart B—Exemptions From Federal Excise Taxes

§ 11.201 Retailers excise taxes.

No retailers excise tax is imposed on the sale of any article:

(a) For the exclusive use of any State, Territory of the United States, of any political subdivision of the foregoing, or the District of Columbia, or

(b) For export, or for shipment to a possession of the United States, and in due course so exported or shipped. This exemption shall be utilized, in accordance with Departmental procedures, by purchasing on a tax-exclusive basis and furnishing the required proof of exportation or shipment to a possession (which includes the Panama Canal Zone, the Virgin Islands, Guam, Puerto Rico, American Samoa, Wake and the Midway Islands) if:

(1) The purchase is substantial; and

(2) Exportation or shipment to a possession is intended to follow not more than 6 months after title passes to the Government.

(c) Upon sale to retailers for resale. Sales by the United States, or any agency or instrumentality thereof, are not exempt unless specifically made exempt by statute. However, the tax on special motor fuels imposed by section 4041(b) of the Internal Revenue Code (see § 11.101–6) does not apply to sales of supplies for use as sea stores, fuel supplies, ships' stores, or legitimate equipment necessary for the navigation, propulsion, and upkeep of vessels of war or military aircraft, including guided missiles and pilotless aircraft, owned or chartered by the United States. If supplies upon which a tax has been paid are sold for any of the exempt uses enumerated above, a credit or refund of the tax paid is due. When it is economically advantageous to do so, this exemption, credit, or refund shall be utilized, by purchase on a tax-exclusive basis and execution of the required exemption certificate, in accordance with Departmental procedures.

§ 11.202 Manufacturers excise taxes.

No manufacturers excise tax is imposed on the sale of any article:

(a) For use by the purchaser for further manufacture or for resale to a second purchaser for use by such second purchaser in further manufacture. (An article shall be treated as sold for use in further manufacture if sold for use by the purchaser as material in the manufacture or production of, or as a component part of, another taxable article to be manufactured or produced. In the case of automobile parts and accessories, radio or television components, or camera lens, it is not necessary that the produced article be a taxable article. This exemption does not apply to tires, inner tubes, or automobile radio or television receiving sets.);

(b) For export, or for resale to a second purchaser for export. This exemption shall be obtained only when the purchase is substantial and exportation or shipment to a possession is intended to follow not more than 6 months after title passes to the Government. (This exemption is limited to sales by a manufacturer, and is not applicable to sales for export or shipment to a possession from the stock of a dealer who was not the manufacturer, producer, or importer.);

(c) For use by the purchaser as supplies for vessels or aircraft, that is, on sales of supplies for use as sea stores, fuel supplies, ships' stores, or legitimate equipment necessary for the navigation, propulsion, or upkeep of vessels of war or military aircraft, including guided missiles and pilotless aircraft, owned or chartered by the United States. (If supplies upon which a tax has been paid are sold for any of the exempt uses enumerated above, the manufacturer is entitled to a credit or refund of the tax paid, irrespective of whether the supplies are sold directly to the consumer by the manufacturer or are sold through a dealer. When it is economically advantageous to do so, this exemption, credit, or refund shall be utilized, by purchase on a tax-exclusive basis and execution of the required exemption certificate, in accordance with Departmental procedures.);

(d) Or the Exclusive use of a State or local government; or

(e) To a nonprofit educational organization.

§ 11.203 Supplies and services for the exclusive use of the United States.

By virtue of action taken by the Secretary of the Treasury, pursuant to section 4293 of the Internal Revenue Code, exemption is available, and shall be obtained, to the extent indicated, from the following Federal excise taxes:

(a) Tax on communication services and facilities furnished directly to the United States (as distinguished from being furnished to a Government contractor) and paid for directly by the Government (Such exemption is obtained without any exemption certificate.);

(b) Tax on transportation of persons for transportation furnished the United States upon a Government transportation request (Such exemption is obtainable by use of such transportation request.); and

(c) Tax on rental of business machines (see § 11.102–12).

§ 11.204 Exemptions from other Federal taxes.

Any department that purchases supplies or services subject to a Federal excise tax, other than those outlined in Subpart A of this part, shall prescribe rules to govern the utilization of any exemptions from such tax.

§ 11.205 Tax exemption forms.

Standard Government exemption forms acceptable to the Internal Revenue Service shall be used in accordance with Departmental procedures (see §16.804 of this subchapter).

Subpart C—State and Local Taxes

§ 11.301 Applicability.

As a general rule, Government purchases are exempt from state and local taxes. This exemption shall be made use of to the fullest extent available, by means of purchase on a tax-exclusive basis and execution of an approved tax exemption certificate. Whenever there is any doubt as to the availability of such exemption, the matter shall be referred to the appropriate office of the Department concerned.

§ 11.302 Tax exemption forms.

Standard Form 1094 (U.S. Government Tax Exemption Certificate) Revised, shall be used to the extent prescribed in § 16.804 of this subchapter.

Subpart D—Contract Clauses

§ 11.401 Fixed-price type contracts.

§ 11.401–1 Clause for advertised and certain negotiated contracts.

Except in contracts to be performed entirely outside the United States, its possessions, and Puerto Rico, the following clause shall be inserted in (a) all formally advertised contracts (other than construction contracts not in excess of $10,000), and (b) negotiated fixed-price type contracts in excess of $10,000 where the contracting officer is satisfied that the contract price, by virtue of competition or otherwise, excludes contingencies for State and local taxes. In negotiated fixed-price type contracts in excess of $2,500 but not in excess of $10,000, the clause may, in the discretion of the contracting officer, be inserted.

FEDERAL, STATE, AND LOCAL TAXES (JAN. 1958)

(a) As used throughout this clause, the term "tax inclusive date" means the date of negotiated contracts and the date set for the opening of bids for contracts entered into through formal advertising. As to additional supplies or services procured by modification to this contract, the term "tax inclusive date" means the date of such modification.

(b) Except as may be otherwise provided in this contract, the contract price includes all Federal, State, and local taxes and duties in effect and applicable to this contract on the tax inclusive date, except taxes (other than Federal transportation taxes) from which the Government, the Contractor, or the transactions or property covered by this contract are then exempt. Unless specifically excluded, duties are included in the contract price, and, if freight is included in the contract price, Federal transportation taxes are likewise included.

(c) (1) If the Contractor is required to pay or bear the burden—

(i) Of any tax or duty, which either was not to be included in the contract price pursuant to the requirements of paragraph (b), or was specifically excluded from the contract price by a provision of this contract, or

(ii) Of an increase in rate of any tax or duty, whether or not such tax or duty was excluded from the contract price;

or of any interest or penalty thereon, the contract price shall be correspondingly increased: *Provided*, That the Contractor warrants in writing that no amount of such tax, duty, or rate increase was included in the contract price as a contingency reserve or otherwise: *And provided further*, That liability for such tax, duty, rate increase, interest, or penalty was not incurred through the fault or negligence of the Contractor or its failure to follow instructions of the Contracting Officer.

(2) If the Contractor is not required to pay or bear the burden, or obtains a refund or drawback, in whole or in part, of any tax, duty, interest, or penalty which (i) was to be included in the contract price pursuant to the requirements of paragraph (b), (ii) was included in the contract price, or (iii) was the basis of an increase in the contract price, the contract price shall be correspondingly decreased or the amount of such relief, refund, or drawback shall be paid to the Government, as directed by the Contracting Officer. The contract price also shall be correspondingly decreased if the Contractor, through its fault or negligence or its failure to follow instructions of the Contracting Officer, is required to pay or bear the burden,

or does not obtain a refund or drawback of any such tax, duty, interest, or penalty. Interest paid or credited to the Contractor incident to a refund of taxes shall inure to the benefit of the Government to the extent that such interest was earned after the Contractor was paid or reimbursed by the Government for such taxes.

(3) Invoices or vouchers covering any adjustment of the contract price pursuant to this paragraph (c) shall set forth the amount thereof as a separate item and shall identify the particular tax involved.

(4) Nothing in this paragraph (c) shall be applicable to social security taxes; net income taxes; excess profit taxes; capital stock taxes; Federal transportation taxes, except changes in the rate thereof, including repeal, pertaining to shipments from the Contractor to the Government; unemployment compensation taxes; or any State and local taxes, except those levied on or measured by the contract or sales price of the services or completed supplies furnished under this contract, including gross income taxes, gross receipts taxes, sales and use taxes, excise taxes, or franchise or occupation taxes measured by sales or receipts from sales.

(5) No adjustment of less than $100 shall be made in the contract price pursuant to this paragraph.

(d) Unless there does not exist any reasonable basis to sustain an exemption, the Government agrees upon request of the Contractor, without further liability except as otherwise provided in this contract, to furnish evidence appropriate to establish exemption from (i) any Federal tax, which the Contractor warrants in writing was excluded from the contract price, or (ii) any State or local tax: *Provided*, That evidence appropriate to establish exemption from duties will be furnished, and Government bills of lading will be issued, only at the discretion of the Contracting Officer. In addition, the Contracting Officer may furnish evidence appropriate to establish exemption from any tax that may, pursuant to this clause, give rise to either an increase or decrease in the contract price.

(e) (1) The Contractor shall promptly notify the Contracting Officer of all matters pertaining to Federal, State, and local taxes and duties that reasonably may result in either an increase or decrease in the contract price.

(2) Whenever an increase or decrease in the contract price may be required under this clause, the Contractor shall take action as directed by the Contracting Officer, and the contract price shall be equitably adjusted to cover the costs of such action, including any interest, penalty, and reasonable attorney's fees.

§ 11.401–2 Alternate clause for certain negotiated contracts.

(a) *Use of clause.* (1) Except in contracts to be performed entirely outside the United States, its possessions, and Puerto Rico, the clause set forth in paragraph (b) of this section shall be inserted in all negotiated fixed-price type contracts in excess of $10,000 where the contracting officer is not satisfied that the contract price, by virtue of competition or otherwise, excludes contingencies for State and local taxes. Guidelines for using the clause are set forth below.

(2) Subparagraphs (d) (1) and (d) (2) of the clause, respectively, provide for upward and downward escalation for certain taxes. Subparagraph (d) (4) prohibits upward and downward escalation for social security, income, franchise, excess profit, capital stock, unemployment compensation and property taxes, except:

(i) Income and franchise taxes levied on or measured by (*a*) sales or receipts from sales, or (*b*) the contractor's possession of, interest in, or use of Government-owned property; and

(ii) Property taxes allocable to the contract which are assessed on completed supplies covered by the contract, or on the contractor's possession of, interest in, or use of property title to which is in the Government.

(3) Paragraph (e) of the clause provides for the furnishing by the Government of evidence of exemption from taxes which the contractor warrants were excluded from the contract price. Evidence of exemption shall be issued only where there is a reasonable basis therefor.

(4) Paragraph (f) (1) of the clause obligates the contractor to notify the contracting officer of any tax matters (e.g., unexpected tax assessments or new legislation) which reasonably may be expected to result in an increase or decrease in the contract price. Paragraph (f) (2) obligates the contractor to follow instructions of the contracting officer when an adjustment in the contract price may be required, and provides for adjustment of the contract price to cover the costs of such action.

(5) Paragraph (b) of the clause furnishes criteria for determining the taxes included in the contract price. However, the contract may provide for the exclusion of a specific tax from the contract price. Where the contracting officer has doubt as to the applicability or allocability of any tax, language appropriate to the particular circumstances should be included in the contract after obtaining any approval required by the Department concerned. Special consideration should be accorded taxes assessed on the contractor's possession of, interest in, or use of Government-owned real and personal property. In accordance with Departmental procedures, the following provision may be inserted in any contract under which the contractor has possession of property to which the Government has title on the tax assessment date, pursuant to progress payment clauses or otherwise:

All property taxes assessed on the Contractor's possession of, interest in, or use of property title to which is in the Government are excluded from the contract price.

(6) Where Government property is furnished under a facilities contract, the contracting officer shall review the facilities contract when negotiating a subsequent supply contract to assure that the contractor is not reimbursed twice for the same taxes.

(b) *Clause.*

FEDERAL, STATE, AND LOCAL TAXES (JULY 1960)

(a) As used throughout this clause, the term "contract date" means the date of this contract. As to additional supplies or services procured by modification to this contract, the term "contract date" means the date of such modification.

(b) Except as may be otherwise provided in this contract, the contract price includes, to the extent allocable to this contract, all Federal, State, and local taxes which, on the contract date:

(i) by Constitution, statute, or ordinance, are applicable to this contract, or to the transactions covered by this contract, or to property or interests in property; or

(ii) pursuant to written ruling or regulation, the authority charged with administering any such tax is assessing or applying to, and is not granting or honoring an exemption for, a contractor under this kind of contract, or the transactions covered by this contract, or property or interests in property.

(c) Except as may be otherwise provided in this contract, duties in effect on the contract date are included in the contract price, to the extent allocable to this contract.

(d) (1) If the Contractor is required to pay or bear the burden—

(i) of any tax or duty which either was not to be included in the contract price pursuant to the requirements of paragraphs (b) and (c), or of a tax or duty specifically excluded from the contract price by a provision of this contract; or

(ii) of an increase in rate of any tax or duty, whether or not such tax or duty was excluded from the contract price; or

(iii) of any interest or penalty on any tax or duty referred to in (i) or (ii) above; the contract price shall be increased by the amount of such tax, duty, interest, or penalty allocable to this contract; provided, that the Contractor warrants in writing that no amount of such tax, duty, or rate increase was included in the contract price as a contingency reserve or otherwise; and provided further, that liability for such tax, duty, rate increase, interest or penalty was not incurred through the fault or negligence of the Contractor or his failure to follow instructions of the Contracting Officer.

(2) If the Contractor is not required to pay or bear the burden, or obtains a refund or drawback, in whole or in part, of any tax, duty, interest, or penalty which:

(i) was to be included in the contract price pursuant to the requirements of paragraphs (b) and (c);

(ii) was included in the contract price; or

(iii) was the basis of an increase in the contract price; the contract price shall be decreased by the amount of such relief, refund, or drawback allocable to this contract, or the allocable amount of such relief, refund, or drawback shall be paid to the Government, as directed by the Contracting Officer. The contract price also shall be similarly decreased if the Contractor, through his fault or negligence or his failure to follow instructions of the Contracting Officer, is required to pay or bear the burden, or does not obtain a refund or drawback of any such tax, duty, interest, or penalty. Interest paid or credited to the Contractor incident to a refund of taxes shall inure to the benefit of the Government to the extent that such interest was earned after the Contractor was paid or reimbursed by the Government for such taxes.

(3) Invoices or vouchers covering any adjustment of the contract price pursuant to this paragraph (d) shall set forth the amount thereof as a separate item and shall identify the particular tax or duty involved.

(4) This paragraph (d) shall not be applicable to social security taxes; income and franchise taxes, other than those levied on or measured by (i) sales or receipts from sales, or (ii) the Contractor's possession of, interest in, or use of property, title to which is in the Government; excess profits taxes; capital stock taxes; unemployment compensation taxes; or property taxes, other than such property taxes, allocable to this contract, as are assessed either on completed supplies covered by this contract, or on the Contractor's possession of, interest in, or use

of property, title to which is in the Government.

(5) No adjustment of less than $100 is required to be made in the contract price pursuant to this paragraph (d).

(e) Unless there does not exist any reasonable basis to sustain an exemption, the Government upon request of the Contractor, without further liability, agrees, except as otherwise provided in this contract, to furnish evidence appropriate to establish exemption from any tax which the Contractor warrants in writing was excluded from the contract price. In addition, the Contracting Officer may furnish evidence appropriate to establish exemption from any tax that may, pursuant to this clause, give rise to either an increase or decrease in the contract price. Except as otherwise provided in this contract, evidence appropriate to establish exemption from duties will be furnished only at the discretion of the Contracting Officer.

(f)(1) The Contractor shall promptly notify the Contracting Officer of all matters pertaining to Federal, State, and local taxes, and duties, that reasonably may be expected to result in either an increase or decrease in the contract price.

(2) Whenever an increase or decrease in the contract price may be required under this clause, the Contractor shall take action as directed by the Contracting Officer, and the contract price shall be equitably adjusted to cover the costs of such action, including any interest, penalty, and reasonable attorneys' fees.

§ 11.402 Cost-reimbursement type contracts.

No specific tax clause is required in any cost-reimbursement type contract. In all such contracts the problem of Federal, State, and local taxes (which presents solely a question of allowability of costs in connection with the performance of cost-reimbursement type contracts) is covered in the contract clause set forth in § 7.203–4 of this subchapter and is treated in Part 15 of this subchapter.

§ 11.403 Foreign tax exemption clauses.

§ 11.403–1, General.

(a) *Use of clauses.* Tax agreements have been made with Belgium, Denmark, France, Federal Republic of Germany (including West Berlin), Greece, Iceland, Italy, Japan, Luxembourg, the Netherlands, Norway, the Philippines, Portugal, Spain, Turkey, the United Kingdom, and Yugoslavia, under which the United States expenditures for the common defense are exempt from certain specified taxes of the countries in which these expenditures are made. The clauses in § 11.403–2 shall be included in all contracts to be performed by contractors or by foreign governments in those foreign countries with which such tax agreements have been made. However, such clauses need not be included in contracts under $1,000 if the contracting officer determines that the administrative burden of securing relief from such taxes would be out of proportion to the relief obtained; provided, that such clauses shall be included in all contracts in support of NATO infrastructure programs involving the expenditure of funds under section 104 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1814).

(b) *Exclusion of specific taxes from the contract price.* The contracting officer, at the time of negotiation of a contract that is to contain one of the clauses in § 11.403–2, shall obtain and make a part of the contract file detailed information concerning the specific taxes and amounts, normally applicable to the transaction, from which the Government of the United States is exempt under the provisions of applicable tax agreements.

§ 11.403–2 Contract clauses.

In accordance with § 11.403–1 and except as provided therein, the appropriate one of the clauses in paragraphs (a) through (d) of this section shall be included in each contract to which a tax agreement is relevant.

(a) *Fixed-price type contracts with foreign contractors other than foreign governments.*

TAXES (JULY 1960)

(a) The contract price, including the prices in any subcontracts hereunder, does not include any tax or duty which the Government of the United States and the Government of _____ have agreed shall not be applicable to expenditures made by the United States in _____, or any tax or duty from which the Contractor, or any subcontractor hereunder, is exempt under the laws of _____. If any such tax or duty has been included in the contract price, through error or otherwise, the contract price shall be correspondingly reduced.

(b) If for any reason after the contract date, the Contractor is relieved in whole or in part from the payment or the burden of any tax or duty included in the contract price, the contract price shall be correspondingly reduced.

(b) *Fixed-price type contracts with foreign governments.*

TAXES (JULY 1960)

(a) The contract price, including the prices in any subcontracts hereunder, does not include any tax or duty which the Government of the United States and the Government of _____ have agreed shall not be applicable to expenditures made by the United States in _____, or any tax or duty not applicable to this contract or any subcontracts hereunder, pursuant to the laws of _____. If any such tax or duty has been included in the contract price through error or otherwise, the contract price shall be correspondingly reduced.

(b) If, after the contract date, the Government of the United States and the Government of _____ shall agree that any tax or duty included in the contract price shall not be applicable to expenditures by the United States in _____, the contract price shall be reduced accordingly.

(c) *Cost-reimbursement type contracts with foreign contractors other than foreign governments.*

TAXES (JULY 1960)

Any tax or duty from which the United States Government is exempt by agreement with the Government of _____, or from which the Contractor or any subcontractor hereunder is exempt under the laws of _____, shall not constitute an allowable cost under this contract.

(d) *Cost-reimbursement type contracts with foreign governments.*

TAXES (JULY 1960)

Any tax or duty from which the United States Government is exempt by agreement with the Government of _____, or from which any subcontractor hereunder is exempt under the laws of _____, shall not constitute an allowable cost under this contract.

§ 11.404 Clause for use where foreign tax agreements do not apply.

The following clause may be used in lieu of the clauses in § 11.401 where contract performance will be entirely in a foreign country with which the United States does have a tax agreement.

TAXES (JULY 1960)

The contract price includes any and all applicable taxes.

PART 12—LABOR

Sec.
12.000 Scope of part.

Subpart A—Basic Labor Policies

12.101 Labor relations.
12.102 Overtime, extra-pay shift, and multi-shift work.
12.102–1 Definitions.
12.102–2 Policy.
12.102–3 Procedures.
12.102–4 Approvals.
12.102–5 Exceptions.
12.102–6 Construction contracts.
12.103 Federal and State labor requirements.
12.104 Meeting manpower requirements.

Subpart B—Convict Labor

12.201 Basic requirement.
12.202 Applicability.
12.203 Contract clause.

Subpart C—Eight-Hour Law of 1912 (Other Than Construction Contracts)

12.300 Scope of Subpart.
12.301 Statutory requirement.
12.302 Applicability.
12.303 Contract clauses.
12.303–1 Clause for general use.
12.303–2 Clause for contracts with a State or political subdivision.

Subpart D—Labor Standards in Construction Contracts

12.400 Scope of subpart.
12.401 Statutes and regulations.
12.402 Applicability.
12.403 Contract clauses.
12.403–1 Clauses for general use.
12.403–2 Contracts for $2,000 or less.
12.403–3 Overseas contracts.
12.403–4 Contracts with a State or political subdivision.
12.404 Administration and enforcement.
12.404–1 General.
12.404–2 Wage determinations.
12.404–3 Additional classifications.
12.404–4 Apprentices.
12.404–5 Subcontracts.
12.404–6 Payrolls and statements.
12.404–7 Investigations.
12.404–8 Reports of violations.
12.404–9 Suspensions and deductions of contract payments.
12.404–10 Restitution.
12.404–11 Contract terminations.
12.404–12 Cooperation with Department of Labor.

Subpart E—[Reserved]

Subpart F—Walsh-Healey Public Contracts Act

12.601 Statutory requirement.
12.602 Applicability.
12.602–1 General.
12.602–2 Department of Labor regulations and interpretations.
12.603 Responsibilities of contracting officers.
12.604 Contract clause.

Subpart G—Fair Labor Standards Act of 1938

12.701 Basic statute.
12.702 Suits against Government contractors.
12.703 Rulings on applicability or interpretation.

Subpart H—Nondiscrimination in Employment

12.801 Policy.
12.802 Basic requirement.
12.803 Applicability.
12.804 Special requirements or emergencies.
12.805 Interpretations.
12.806 Administration.
12.806–1 General.
12.806–2 Educational responsibility.
12.806–3 Posting of notices.
12.806–4 Compliance reviews.
12.806–5 Complaints.
12.806–6 Incomplete complaints.
12.806–7 Processing of complaints.
12.806–8 Reporting channels.
12.807 Contact with the President's Committee.

Subpart I—Employment Restrictions for Security Purposes

12.901 Restrictions on hiring of aliens and other individuals.
12.902 Responsibilities of contractors to employees.
12.903 Contracts classified "Atomic Energy Restricted."

AUTHORITY: §§ 12.000 to 12.903 issued under R. S. 161, sec. 2202, 70A Stat. 120; 5 U. S. C. 22, 10 U. S. C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U. S. C. 2301–2314.

§ 12.000 Scope of part.

This part (a) deals with general policies regarding labor, so far as they relate to procurement, (b) sets forth certain pertinent labor laws and requirements, indicating in connection with each its applicability and any procedures thereunder, and (c) prescribes the contract clauses with respect to each labor law or requirement.

Subpart A—Basic Labor Policies

§ 12.101 Labor relations.

Each Department shall maintain and encourage the best possible relations with industry and labor in order that the Government may procure needed supplies and services without delay. All problems arising out of the labor relations of private contractors, and all communications with labor organizations or Federal agencies relative thereto, shall be handled in accordance with procedures prescribed by each respective Department and consistently with the following general policy:

(a) The Departments shall exchange information with respect to labor matters for the purpose of maintaining a uniform labor policy throughout the Department of Defense.

(b) With respect to labor relations matters in general, each Department shall not take any independent action, the result of which would have the effect of establishing major policy, unless each such action falls within an established policy of the Department of Defense, or unless prior approval of the Office of the Assistant Secretary of Defense (Manpower and Personnel) has been obtained. Each Department must determine for itself what actions involve major policy. Recommendations for plant seizure or for injunctive action against labor or management would be examples of actions establishing major policy.

(c) Where any labor dispute significantly affects, or so threatens to affect, important procurement, the Department concerned shall notify the Office of the Assistant Secretary of Defense (Manpower, Personnel, and Reserve) and any other interested Department of all information relevant thereto, in accordance with Department of Defense Directive Number 1135.3, dated 8 January 1953, Subject: Participation in Industrial Relations Matters Affecting Procurement.

(d) Each Department shall remain impartial in, and shall refrain from taking a position on the merits of, a dispute between labor and private management. No Department shall undertake the conciliation, mediation, or arbitration of a labor dispute.

(e) Each Department shall take other action in connection with labor relations problems which is consistent with its procurement responsibilities, as for example:

(1) Giving notice of the existence of a labor dispute, which affects, or threatens to affect, procurement of supplies or services, to the Government agency which has responsibility for conciliation, mediation, arbitration, or other action with respect thereto.

(2) Advising the Government agency, responsible for action with respect to labor disputes, or the parties to a labor dispute, of factual information pertaining to procurement of the supplies or services involved, to the extent consistent with security regulations.

(3) Seeking to obtain such voluntary agreement between management and labor as will permit, notwithstanding the general continuance of the dispute, uninterrupted procurement of military supplies and services, provided such activity does not involve the Department in the merits of a labor difference or dispute.

§ 12.102 Overtime, extra-pay shift, and multi-shift work.

§ 12.102–1 Definitions.

As used throughout this section, the following terms shall have the meanings set forth below:

(a) "Normal work week" and "normal work day" mean, generally, a work week of 40 hours and a work day of 8 hours, respectively: *Provided*, That, in any area outside the United States, its Territories, its possessions, and Puerto Rico, a work week longer than 40 hours, or a work day longer than 8 hours will be considered normal (1) if such work week or work day does not exceed that which is normal for such area, as determined by local custom, tradition, or law, and (2) if hours worked in excess of 40 in such work week, or 8 in such work day, are not compensated at a premium rate of pay.

(b) "Overtime" means time worked by a contractor's employee in excess of the employee's normal work week or normal work day.

(c) "Shift premium" means the difference between the compensation paid to an employee at the contractor's regular rate of pay for the base shift and that paid at the regular rate of pay for extra-pay-shift work.

(d) "Overtime premium" means the difference between the compensation paid to an employee at the contractor's regular rate of pay for the shift involved and that paid for hours worked overtime.

§ 12.102–2 Policy.

It is the policy of the Department of Defense that contracts will be performed, so far as practicable, without the use of overtime, extra-pay shifts, or multi-shifts, and, in particular, without the use of overtime as a regular em-

ployment practice. Overtime, extra-pay shifts, and multi-shifts, when required, shall, to the extent practicable, be limited to, and be the minimum needed for, the accomplishment of specific work.

§ 12.102–3 Procedures.

(a) Except as provided in § 12.102–4, invitations for bids and requests for proposals shall not specify delivery or performance schedules which may be reasonably anticipated to necessitate overtime.

(b) In the negotiation of contracts in excess of $10,000, the contracting officer, consistent with the nature and size of the procurement, shall use his best efforts (1) to ascertain the extent to which proposals and quotations are based on the payment of overtime premiums and shift premiums, and (2) to negotiate contract prices or estimated costs which are not based on the payment of overtime premiums or shift premiums, taking into consideration the practicability of procurement from other sources of all or a part of the requirement.

(c) Excepting (1) firm fixed-price contracts, (2) fixed-price contracts with escalation not providing for labor escalation, and (3) fixed-price contracts providing for price redetermination prospectively only, all contracts in excess of $10,000 shall contain the following clause:

PAYMENT FOR OVERTIME AND SHIFT PREMIUMS (MAY 1960)

The contract price shall not include any amount on account of overtime premiums or shift premiums, except to the extent that they either (i) have been approved in writing on behalf of the Government or (ii) are paid for work—

(A) Necessary to cope with emergencies such as those resulting from accidents, natural disasters, breakdowns of production equipment, or occasional production bottlenecks of a sporadic nature;

(B) By indirect labor employees such as those performing duties in connection with administration, protection, transportation, maintenance, standby, plant protection, operation of utilities, or accounting;

(C) In the performance of tests, industrial processes, laboratory procedures, loading or unloading of transportation media, and operations in flight or afloat, which are continuous in nature and cannot reasonably be interrupted or otherwise completed; or

(D) Which will result in lower overall cost to the Government. In cost-reimbursement type contracts, the words "Allowable cost" should be substituted for "The contract price" at the start of the foregoing clause, and the foregoing clause shall be designated (a) and the following subparagraph (b) may be added:

(b) The cost of overtime premiums or shift premiums otherwise allowable under (a) above shall be allowed only to the extent the amount thereof is reasonable and properly allocable to the work under this contract.

(d) Overtime for which overtime premiums will be at Government expense shall not be approved under a contract where the contractor is already obligated, without the right to additional compensation, to meet the required delivery date.

(e) Where overtime premiums or shift premiums are being paid in connection with the performance of Government contracts, the continued need therefor shall be subject to periodic review, in accordance with Departmental procedures.

(f) Where two or more military contracting activities have concurrent contracts at a single facility, and the approval of payments of overtime premiums or shift premiums by one such activity is likely to affect the performance of, or payments in connection with, contracts of another such activity, the activities concerned will agree as to which will represent them in (1) determining whether such payment shall be approved, pursuant to § 12.102–4, and (2) scheduling of periodic reviews. Decisions of such representative shall be binding upon all contracting activities concerned. Ordinarily, in the absence of evidence to the contrary, a contracting activity may rely on the contractor's statement that such approval will not affect the performance of, or payments in connection with, any contract of another activity. If the contracting activities do not agree within a reasonable time on which one will represent them, the Secretary concerned (or, in the case where two or more military departments are involved, the Assistant Secretary of Defense (Supply and Logistics)) shall be requested to appoint the representative.

§ 12.102–4 Approvals.

(a) Overtime premiums and shift premiums at Government expense may be approved by the Secretary concerned, or his designee, when any such official determines in writing that such approval:

(1) Is necessary to meet delivery or performance schedules, and such schedules are determined to be extended to the maximum consistent with essential military objectives;

(2) Is necessary to make up for delays beyond the control and without the fault or negligence of the contractor; or

(3) Is necessary to eliminate foreseeable production bottlenecks of an extended nature which cannot be eliminated in any other way.

(b) The designee referred to in paragraph (a) of this section may be one or more officers or civilian officials designated personally by a Secretary for the purpose of approving overtime premiums and shift premiums at Government expense.

(c) Such approvals shall ordinarily be prospective, but may be retroactive where justified by the circumstances.

(d) Such approvals may be for an individual contract, project, or program, or for a plant, division, or company, as most practicable.

§ 12.102–5 Exceptions.

Section 12.102–4 does not apply to overtime premiums or shift premiums which are paid for work:

(a) Necessary to cope with emergencies such as those resulting from accidents, natural disasters, or breakdowns of production equipment, or occasional production bottlenecks of a sporadic nature;

(b) By indirect labor employees such as those performing duties in connection with administration, protection, transportation, maintenance, standby plant protection, operation of utilities, or accounting;

(c) In the performance of tests, industrial processes, laboratory procedures, loading or unloading of transportation media, and operations in flight or afloat, which are continuous in nature and cannot reasonably be interrupted or otherwise completed; or

(d) Which will result in lower over-all cost to the Government.

However, the cost of such overtime premiums or shift premiums may be allowed, or considered in pricing (on the same basis as other indirect costs) only to the extent the amount thereof is reasonable and properly allocable to the work involved.

§ 12.102–6 Construction contracts.

In addition to the foregoing requirements of § 12.102, no expediting action involving additional costs under a construction contract shall be taken without the prior approval of the Assistant Secretary of Defense (Properties and Installations), pursuant to Public Law 85–170 or any substantially identical law.

§ 12.103 Federal and State labor requirements.

It shall be the policy of each Department to cooperate and to require Contractors to cooperate, to the fullest extent possible, with Federal and State agencies responsible for enforcing labor requirements with respect to such matters as safety, health and sanitation, maximum hours and minimum wages, equal pay for women, and child and convict labor.

§ 12.104 Meeting manpower requirements.

It shall be the policy of each Department to cooperate with and to encourage contractors to utilize, to the fullest extent practicable, the United States Employment Service (USES) and its affiliated Local State Employment Service Offices in matters pertaining to meeting contractors' manpower (labor supply) requirements, including the recruitment of workers in all occupations and skills both from local labor market areas and through the Federal-State manpower clearance system to staff new or expanding plant facilities. Local State Employment Service Offices are operated in every State, in the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. In addition to providing recruitment assistance to contractors who need and desire it, cooperation with the Local State Employment Service Offices will further the national program of maintaining continuous assessment of manpower requirements and resources on a national and local basis.

Subpart B—Convict Labor

§ 12.201 Basic requirement.

Pursuant to the policy set forth in the Act of February 23, 1887 (18 U.S. Code 436), and in accordance with the requirements of Executive Order No. 325A

of May 18, 1905, all contracts entered into by any Department involving the employment of labor within the United States, shall, unless otherwise provided by law, contain a clause prohibiting the employment of persons, undergoing sentences of imprisonment at hard labor imposed by State or municipal criminal courts.

§ 12.202 Applicability.

The requirement set forth in § 12.201 applies, except as stated below, to all contracts involving the employment of labor within the United States. The requirement does not prohibit the employment of persons on parole or probation, or of persons who have been pardoned or who have served their terms. Furthermore, the requirement does not apply to the following kinds of contracts:

(a) Any contracts subject to the provisions of the Walsh-Healey Public Contracts Act, (see Subpart F of this part), which contains its own requirement that "no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract";

(b) Any contract (1) for the purchase of supplies or services from Federal Prison Industries, Inc., or (2) for the purchase from any State prison of finished supplies which may be secured in the open market or from existing stocks as distinguished from supplies requiring special fabrication.

§ 12.203 Contract clause.

The contract clause required by this subpart shall be as follows:

CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

Subpart C—Eight-Hour Law of 1912 (Other Than Construction Contracts)

§ 12.300 Scope of subpart.

This subpart deals with the requirements of the Eight-Hour Law of 1912, as amended (40 U.S.C. 324–326), applicable to contracts other than construction contracts as defined and covered in Subpart D of this part.

§ 12.301 Statutory requirement.

In accordance with the requirement of the Eight-Hour Law of 1912, as amended (40 U.S.C. 324–326), certain contracts entered into by any Department shall contain a clause to the effect that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than eight hours in any one calendar day upon such work, unless such laborer or mechanic is compensated for all hours worked in excess of eight hours in any one calendar day at not less than one and one-half times the basic rate of pay.

§ 12.302 Applicability.

The requirement set forth in § 12.301 applies, except as stated in paragraphs (a) to (e) of this section, to all contracts which may require or involve the employment of laborers or mechanics either by a contractor or by any subcontractor. The requirement does not apply to the following kinds of contracts:

(a) Contracts (or portions thereof) to be performed in a foreign country over which the United States has no direct legislative control, to the extent that such contracts (or portions thereof) may require or involve the employment of laborers or mechanics there;

(b) Contracts with a State or political subdivision thereof (although the requirement does apply, and the contract must so provide, to a subcontract thereunder with a private person or firm);

(c) Contracts (or portions thereof) for supplies in connection with which any required services are merely incidental to the sale and do not require substantial employment of laborers or mechanics;

(d) Contracts (or portions thereof) for materials or articles (other than armor or armor plate) usually bought in the open market (although the requirement does apply, and the contract must so provide, with respect to any contract involving the performance of any class of work which is ordinarily, and not merely occasionally or to a limited extent, performed by the Government);

(e) Contracts (or portions thereof) subject to the provisions of the Walsh-Healey Public Contracts Act (see Subpart F of this part).

§ 12.303 Contract clause.

§ 12.303–1 Clause for general use.

Except for those kinds of contracts referred to in § 12.303–2, the contract clause required by this subpart shall be as follows:

EIGHT-HOUR LAW OF 1912—OVERTIME (JAN. 1958)

This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912 as amended (40 U. S. Code 324–326) and is not covered by the Walsh-Healey Public Contracts Act (41 U. S. Code 35–45), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912, as amended, and to all other provisions and exceptions of said Law:

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of the said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day; and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause, and all penalties thus imposed shall be withheld for the use and benefit of the Government.

§ 12.303–2 Clause for contracts with a State or political subdivision.

In the case of contracts with a State or political subdivision thereof (see § 12.302 (b)), the contract clause required by this subpart shall be the clause set forth in § 12.303–1 except that it shall be prefaced by the following provision:

The Contractor agrees to insert the following clause in all subcontracts hereunder with private persons or firms.

Subpart D—Labor Standards in Construction Contracts

§ 12.400 Scope of subpart.

This subpart deals with labor standards for construction contracts as prescribed by the statutes and regulations set forth in § 12.401.

§ 12.401 Statutes and regulations.

(a) *Davis-Bacon Act.* The Davis-Bacon Act (Act of March 3, 1931, as amended; 40 U. S. Code 276a), provides that certain contracts over $2,000 entered into by any Department for the construction, alteration, or repair (including painting and decorating) of public buildings or public works shall contain a provision (see § 12.403) to the effect that no laborer or mechanic employed directly upon the site of the work contemplated by the contract shall receive less than the prevailing wages as determined by the Secretary of Labor.

(b) *Copeland Act.* The Copeland ("Anti-Kickback") Act (18 U. S. Code 874 and 40 U. S. Code 276c) makes it unlawful to induce, by force or otherwise, any person employed in the construction or repair of public buildings or public works (including those financed in whole or in part by loans or grants from the United States) to give up any part of the compensation to which he is entitled under his contract of employment. In accordance with regulations of the Secretary of Labor issued pursuant to the Copeland Act, certain contracts entered into by any Department shall contain a provision (see § 12.403) to the effect that the Contractor and any subcontractor shall comply with the regulations of the Secretary of Labor under the Act.

(c) *Eight-Hour Laws.* See § 12.301. (However, with respect to construction contracts, the applicable statutes are 40 U. S. Code 321–326.)

(d) *Department of Labor regulations.* Pursuant to the foregoing statutes and Reorganization Plan No. 14 of 1950 (15 F. R. 3176), the Secretary of Labor has issued Regulations Part 3, Title 29, Subtitle A, Code of Federal Regulations (7 F. R. 686 as amended) and Regulations Part 5, Title 29, Subtitle A, Code of Federal Regulations (16 F. R. 4430 as amended), providing for the administration and enforcement of these statutes in construction contracts. The requirements under the Davis-Bacon Act

and the Copeland Act apply only to the United States and its Territories while the Eight-Hour Laws apply also to other areas over which the United States has direct legislative control.

§ 12.402 Applicability.

These requirements apply to construction contracts. The term "construction contract" as used in this subpart means any contract providing for the actual construction, alteration or repair, including painting and decorating, of a public building or public work, or of a building or work financed in whole or in part from Federal funds. It generally includes construction activity as distinguished from manufacturing, furnishing of materials, or servicing or maintenance work. It does not apply to the following kinds of contracts:

(a) Contracts for supplies (including installations or maintenance work which is only incidental to the furnishing of such supplies); although the requirement does apply (1) where installation involves a substantial amount of construction at the site, such as for heavy generators and large refrigerators, (2) to the transportation of supplies to or from the site of the work by employees of the construction contractor or of a construction subcontractor, and (3) to the manufacturing or furnishing of supplies such as window frames and other millwork, on the site of the work by the contractor or sub-contractor on a construction, alteration, or repair contract otherwise subject to the act, or to the manufacturing or furnishing of supplies under a contract based upon the specifications, and at the site of the work, of a construction, alteration, or repair contract otherwise subject to the act;

(b) Contracts for servicing or maintenance work (including installation or movement of machinery or other equipment, and incidental plant rearrangement) which involve only an incidental amount of construction, alteration, or repair; although the requirement does apply (1) to installation, movement, or rearrangement of machinery or other equipment involving a substantial amount of construction or repair, and (2) to servicing or maintenance work based upon the specifications of a construction contract otherwise subject to the act and which is performed at the site of the construction work involved;

(c) Contracts for the construction or repair of vessels, aircraft, or other kinds of personal property;

(d) Contracts to be performed at a place not known or not reasonably ascertainable at the time the contract is entered into.

§ 12.403 Contract clauses.

§ 12.403–1 Clauses for general use.

Except as provided in § 12.403–4 every construction contract in excess of $2,000 for work within the United States or its Territories shall include the following clauses:

(1) *Davis-Bacon Act (40 U. S. C. 276a–276a–7).*

DAVIS-BACON ACT (40 U. S. C. 276a–276a–7) (AUG. 1953)

(a) All mechanics and laborers employed or working directly upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by the Copeland Act ("Anti-Kickback") Regulations (29 CFR, Part 3)) the full amounts due at time of payment, computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and a copy of the wage determination decision shall be kept posted by the Contractor at the site of the work in a prominent place where it can be easily seen by the workers.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the Contractor or any subcontractor directly on the site of the work covered by this contract has been or is being paid at a rate of wages less than the rate of wages required by paragraph (a) of this clause, the Contracting Officer may (1) by written notice to the Government prime Contractor terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (2) prosecute the work to completion by contract or otherwise, whereupon such Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(c) Paragraphs (a) and (b) of this clause shall apply to this contract to the extent that it is (1) a prime contract with the Government subject to the Davis-Bacon Act or (2) a subcontract under such prime contract.

(2) *Eight-Hour Laws — overtime compensation.*

EIGHT-HOUR LAWS—OVERTIME COMPENSATION (AUG. 1953)

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day is permitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided,* that this stipulation shall be subject in all respects to the exceptions and provisions of the Eight-Hour Laws, as set forth in U. S. C. 321, 324, 325, 325a, and 326, which relate to hours of labor and compensation for overtime.

(3) *Apprentices.*

APPRENTICES (AUG. 1953)

Apprentices will be permitted to work only under a bona fide apprenticeship program registered with a State Apprenticeship Council which is recognized by the Federal Committee on Apprenticeship, U. S. Department of Labor; or if no such recognized Council exists in a State, under a program registered with the Bureau of Apprenticeship, U. S. Department of Labor.

(4) *Payroll records and payrolls.*

PAYROLL RECORDS AND PAYROLLS (AUG. 1953)

(a) Payroll records will be maintained during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work. Such records will contain the name and address of each such employee, his correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid. The Contractor will make his employment records available for inspection by authorized representatives of the Contracting Officer and the U. S. Department of Labor, and will permit such representatives to interview employees during working hours on the job.

(b) A certified copy of all payrolls will be submitted weekly to the Contracting Officer. The Government prime Contractor will be responsible for the submission of certified copies of the payrolls of all subcontractors. The certification will affirm that the payrolls are correct and complete, that the wage rates contained therein are not less than the applicable rates contained in the wage determination decision of the Secretary of Labor attached to this contract and that the classifications set forth for each laborer or mechanic conform with the work he performed.

(5) *Copeland ("Anti-Kickback") Act—Nonrebate of Wages.*

COPELAND ("ANTI-KICKBACK") ACT—NONREBATE OF WAGES (OCT. 1959)

The regulations of the Secretary of Labor applicable to Contractors and subcontractors (29 CFR Part 3), made pursuant to the Copeland Act, as amended (40 U.S.C. 276c) and to aid in the enforcement of the Anti-Kickback Act (18 U.S.C. 874) are made a part of this contract by reference. The Contractor will comply with these regulations and any amendments or modifications thereof and the Government prime Contractor will be responsible for the submission of statements required of subcontractors thereunder. The foregoing shall apply except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances and exemptions.

(6) *Withholding of funds to assure wage payment.*

WITHHOLDING OF FUNDS TO ASSURE WAGE PAYMENT (AUG. 1953)

There may be withheld from the Contractor so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics employed by the Contractor or any subcontractor the full amount of wages required by this contract. In the event of failure to pay any laborer or mechanic all or part of the wages required by this contract, the Contracting Officer may take such action as may be necessary to cause the suspension, until such violations have ceased, of any further payment, advance, or guarantee of funds to or for the Government prime Contractor.

(7) *Subcontracts—termination.*

SUBCONTRACTS—TERMINATION (AUG. 1953)

The Contractor agrees to insert the clauses hereof entitled "Davis-Bacon Act," "Eight-Hour Laws—Overtime Compensation," "Apprentices," "Payroll Records and Payrolls," "Copeland ('Anti-Kickback') Act—Nonrebate

of Wages," "Withholding of Funds to Assure Wage Payment," and "Subcontracts—Termination" in all subcontracts, and the Contractor further agrees that a breach of any of the requirements of these clauses may be grounds for termination of this contract. The term "Contractor" as used in such clauses in any subcontract shall be deemed to refer to the subcontractor except in the phrase "Government prime Contractor."

When using U. S. Standard Form 23, the "Subcontracts—Termination" clause therein shall be used in lieu of the above clause.

§ 12.403–2 Contracts for $2,000 or less.

Except as provided in § 12.403–4, every construction contract for $2,000 or less for work within the United States or its Territories, shall include the following clauses:

(1) *Eight-hour laws—overtime compensation.*

EIGHT-HOUR LAWS—OVERTIME COMPENSATION (AUG. 1959)

The Eight-Hour Laws (40 U.S.C. 321–326) are applicable to this contract. (In substance they provide that laborers and mechanics employed by the Contractor or his subcontractors shall be paid not less than time and a half for work in excess of 8 hours a day. Contractors or subcontractors violating these laws are punishable under the provisions of 40 U.S.C. 322–324.)

(2) *Nonrebate of wages.*

NONREBATE OF WAGES (AUG. 1959)

The Regulations issued by the Secretary of Labor (29 CFR, Part 3) pursuant to the Anti-Kickback Act, as amended (40 U.S.C. 276(c), 18 U.S.C. 874), are applicable to this contract. (In substance they provide that contractors and subcontractors shall (i) make no deductions from wages except those required by law or permitted by the Regulations; (ii) preserve, for 3 years after completion of the work, payrolls which contain the following data for each employee: name, address, correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid; and (iii) submit weekly a statement of compliance, in the form set out in the Regulation.)

(3) *Subcontractors—termination.*

SUBCONTRACTORS—TERMINATION (AUG. 1959)

The Contractor agrees to insert the clauses hereof entitled "Eight-Hour Laws—Overtime Compensation" and "Nonrebate of Wages" in all subcontracts under this contract. The term "Contractor" as used in such clauses in any subcontract shall be deemed to refer to the subcontractor. Breach of the requirements of these clauses may be grounds for the termination of this contract.

§ 12.403–3 Overseas contracts.

Every construction contract for work outside the continental United States and its territories of Alaska and Hawaii but within any other territory or possession or foreign area over which the United States has direct legislative control shall include (a) the Eight-Hour Laws—Overtime Compensation Clause set forth in § 12.403–1 Clause (2), and (b) the Subcontracts—Termination Clause set forth in § 12.403–1 Clause (7), except that the first sentence thereof shall be modified to refer only to the clauses entitled "Eight-Hour Laws—Overtime Compensation", and "Subcontracts—Termination."

§ 12.403–4 Contracts with a State or political subdivision.

In the case of construction contracts with a state or political subdivision thereof, the contract clauses required by §§ 12.403–1 and 12.403–2 whichever is applicable, shall be inserted therein and each clause shall be prefaced by the following provision:

The Contractor agrees to insert the following in all subcontracts hereunder with private persons or firms.

§ 12.404 Administration and enforcement.

§ 12.404–1 General.

The contracting officer shall ascertain that the contractor is fully informed of the labor standards provisions of the contract and of his responsibilities thereunder. Unless it is clear that the contractor is otherwise fully informed, the contractor shall be so informed either by conference or by letter as soon as possible after award of the contract. Whenever the clauses under § 12.403–1 are applicable, the following action shall be taken or required in accordance with procedures prescribed by each respective Department. Whenever the clauses under §§ 12.403–2, 12.403–3, and 13.403–4 are applicable, the following action shall be taken or required, in accordance with procedures prescribed by each respective Department, to the extent pertinent to the applicable clauses.

§ 12.404–2 Wage determinations.

(a) *Requests for.* Requests for the determination of wage rates by the Secretary of Labor shall be submitted on Department of Labor Form DB–11 at least 30 calendar days before required for the advertisement of negotiation of the contract for which the determination is sought. In exceptional cases, the Secretary of Labor may be requested to make a wage determination in less than 30 calendar days upon a proper showing of unusual circumstances justifying the need therefor.

(b) *Limitations.* If the proposed contract for which a wage determination has been secured has not been awarded within 90 calendar days from the date of such wage determination, a new wage determination shall be obtained and made a part of the proposed contract.

(c) *Modifications.* Modifications by the Secretary of Labor of an original wage determination shall be made part of the proposed contract if received prior to the award of the contract, provided that, in a formally advertised procurement, any modification received by the Department concerned less than 5 calendar days before the opening of bids may be disregarded if award is made within 30 calendar days after the opening of bids or within 90 calendar days from the date of the original wage determination, whichever is the earlier.

(d) *Posting.* The Contracting Officer shall ascertain that a copy of the wage determination is kept posted at the site of the work in a prominent place where it can be easily seen by the workers.

§ 12.404–3 Additional classifications.

If any laborers or mechanics not listed in the wage determination attached to the contract are to be employed, their classifications and minimum wage rates shall be established by the contractor or subcontractor, with the approval of the Contracting Officer, conformably to the attached wage determination. A report of any such determination shall be transmitted to the Secretary of Labor. If the interested parties cannot agree upon any such additional classification and wage rate, the matter, accompanied by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for final determination.

§ 12.404–4 Apprentices.

The contractor or subcontractors shall be required to furnish certification or other evidence that each apprentice employed is registered in an approved apprenticeship program. (For certification form, see paragraph (c) of § 16.803–1 of this subchapter.)

§ 12.404–5 Subcontracts.

The Contracting Officer shall obtain a list of all subcontracts, together with a description of the work to be performed thereunder.

§ 12.404–6 Payrolls and statements.

(a) *Submission.* Within 7 calendar days after the regular payment date of the payroll week covered, the contractor is required to submit, or cause to be submitted for himself and his subcontractors, (1) copies of certified weekly payrolls in compliance with Clause (4) of § 12.403–1 and (2) weekly payroll statements in compliance with Clause (5) of § 12.403–1. (See § 16.803–1(c) of this subchapter.)

(b) *Examination.* The Department concerned shall make such examination of the certified payrolls and statements as may be necessary to assure compliance with contract, statutory and regulatory requirements. Particular attention should be given to the correctness of classifications and any disproportionate employment of laborers, helpers or apprentices.

(c) *Preservation.* Certified payrolls and statements shall be preserved by the Department concerned for a period of 3 years from completion of the contract and shall be produced at the request of the Secretary of Labor at any time during such period.

§ 12.404–7 Investigations.

(a) The Department concerned shall make such investigations as may be necessary to assure compliance with contract, statutory and regulatory requirements. Contracts of 6 months or less duration shall be investigated before final payment is made, if feasible. Longer contracts shall be investigated with such frequency as may be necessary. Such investigations shall include interviews of employees on a sampling basis.

(b) Special investigations in detail shall be made when required by complaints or other evidence of violations. Complaints of violations shall be given priority.

(c) Statements, written or oral, made by an employee shall be treated as confidential and shall not be disclosed to

the employer without the consent of the employee.

§ 12.404–8 Reports of violations.

(a) A report of violations shall be made by the Department concerned to the Secretary of Labor except in cases of nonwillful violations where less than $200 is involved, restitution is made, and assurance is given of future compliance by the contractor or subcontractor concerned. Such reports shall include a statement of the findings as to the violations and information as to restitution made, payment deductions, contract terminations, and the names and addresses of the workers, contractors and subcontractors concerned.

(b) Where there is substantial evidence that violations are willful and in breach of the False Affidavits Act (18 U. S. C. 1001) or other criminal statute, the matter shall be forwarded to the Attorney General for prosecution and the Secretary of Labor shall be informed of such action.

§ 12.404–9 Suspensions and deductions of contract payments.

In the event of failure or refusal to pay all or any part of the wages due workers, the Contracting Officer may suspend further contract payments to the contractor in amounts equal to such unpaid wages until either restitution has been made directly by the contractor or subcontractor concerned or deductions against payment vouchers are made as provided below. If such failure or refusal appears continuing and willful, or in the event of any other failure or refusal to comply with contract, statutory, and regulatory requirements, the Contracting Officer may suspend all future contract payments to the contractor until such violations have ceased. If restitution is not made directly by the contractor or subcontractor within a reasonable time, or, in any event, prior to final payment under the contract, the Contracting Officer shall submit with the contractor's payment voucher or vouchers a "Schedule of Deductions from Payments to Contractors (Act of August 30, 1935)" on Standard Form 1093, and the amount so shown to be due workers shall be deducted from the payments made to the contractor and shall be deposited in the Treasury in accordance with Department procedures.

§ 12.404–10 Restitution.

Restitution of amounts due workers may be permitted at any time at the volition of the contractor or subcontractor and may be ordered by the Department concerned whenever wage underpayments are found to be nonwillful.

§ 12.404–11 Contract terminations.

Whenever a contract is terminated for violation of the labor standards provisions, a report shall be submitted by the Department concerned to the Secretary of Labor and the Comptroller General. The report shall include the name and address of the terminated contractor or subcontractor, the name and address of the contractor or subcontractor who is to complete the work, the amount and number of the latter's contract, and a description of the work thereunder.

§ 12.404–12 Cooperation with Department of Labor.

The Department concerned shall cooperate with representatives of the Department of Labor in the inspection of records, interviews with workers and all other aspects of investigations undertaken by the Department of Labor. When requested, the Departments shall furnish to the Secretary of Labor any available information with respect to contractors, subcontractors, their contracts and the nature of the contract work.

Subpart E—[Reserved]

Subpart F—Walsh-Healey Public Contracts Act

§ 12.601 Statutory requirement.

In accordance with the requirement of the Walsh-Healey Public Contracts Act (Act of June 30, 1936, as amended; 41 U.S. Code 35–45), all contracts entered into by any Department for the manufacture or furnishing of supplies in any amount exceeding $10,000 (a) will be with manufacturers or regular dealers, and (b) shall incorporate by reference the representations and stipulations required by said Act pertaining to such matters as minimum wages, maximum hours, child labor, convict labor, and safe and sanitary working conditions.

§ 12.602 Applicability.

§ 12.602–1 General.

The requirement set forth in the preceding paragraph applies to contracts for the manufacture or furnishing of "materials, supplies, articles, and equipment" which are to be performed within the United States, Puerto Rico, or the Virgin Islands, and which exceed or may exceed $10,000 in amount.

§ 12.602–2 Department of Labor regulations and interpretations.

Pursuant to the Walsh-Healey Act, the Secretary of Labor has issued detailed regulations and interpretations as to the coverage of said Act, and exemptions and procedures thereunder. These regulations and interpretations are compiled in a document entitled "Walsh-Healey Public Contracts Act, Rulings and Interpretations." In addition to the interpretations stated in that domument, attention is directed to an opinion of the Department of Labor that contracts which are originally $10,000 or less, but are subsequently modified to increase the price to an amount in excess of $10,000, are subject to the Walsh-Healey Act; and that contracts in an amount exceeding $10,000 which are subsequently modified to a figure of $10,000 or less, are not subject to said Act with respect to work performed after such modification if modification is effected by mutual agreement.

§ 12.603 Responsibilities of contracting officers.

Whenever the Walsh-Healey Public Contracts Act is applicable, the contracting officer shall, pursuant to regulations or instructions issued by the Secretary of Labor and in accordance with procedures prescribed by each respective military department—

(a) Inform prospective contractors of the possible applicability of minimum wage determinations;

(b) Furnish to the contractor a poster (Form PC–13);

(c) Furnish to the contractor a form letter (Form PC–12) explaining the Walsh-Healey Act;

(d) Prepare and transmit three copies of DD Form 350 (top portion); (see § 16.803–2 (c) of this subchapter);

(e) Report to the Department of Labor any violation of the representations or stipulations required by the Walsh-Healey Act.

§ 12.604 Contract clause.

The contract clause required by this Subpart F shall be as follows:

WALSH-HEALEY PUBLIC CONTRACTS ACT (JAN. 1958)

If this contract is for the manufacture or furnishing of materials, supplies, articles, or equipment in an amount which exceeds or may exceed $10,000 and is otherwise subject to the Walsh-Healey Public Contracts Act, as amended (41 U. S. Code 35–45), there are hereby incorporated by reference all representations and stipulations required by said Act and regulations issued thereunder by the Secretary of Labor, such representations and stipulations being subject to all applicable rulings and interpretations of the Secretary of Labor which are now or may hereafter be in effect.

Subpart G—Fair Labor Standards Act of 1938

§ 12.701 Basic statute.

The Fair Labor Standards Act of 1938 (Act of June 30, 1938; 29 U.S. Code 201–219), as amended, provides for the establishment of minimum wage and maximum hour standards, creates a Wage and Hour Division in the Department of Labor for purposes of interpretation and enforcement (including investigations and inspections of Government contractors), and prohibits oppressive child labor. Said act applies to all employees, unless otherwise exempted, who are engaged in (a) interstate commerce or foreign commerce or (b) the production of goods for such commerce or (c) any closely related process or occupation essential to such production.

§ 12.702 Suits against Government contractors.

Payments made pursuant to the provisions of the Fair Labor Standards Act are usually reimbursable under cost or cost-plus-a-fixed-fee contracts. Consequently, each military department has a direct interest in claims and suits under said Act which are made or brought in connection with such contracts. In this connection, procedures have been established, by agreement between the Department of Justice on the one hand and the military departments on the other hand, governing the defense of such Fair Labor Standards Act suits. These procedures in general contemplate the defense of Fair Labor Standards Act suits by private

counsel employed by the contractor, the employment of whom is approved by the military department concerned. These procedures must be followed if contractors are to be reimbursed for the amount of any judgment under said Act, or for any litigation expenses (including the reasonable fees of such private counsel).

§ 12.703 Rulings on applicability or interpretation.

Contractors or contractor employees who inquire concerning applicability or interpretation of the Fair Labor Standards Act shall be advised that rulings concerning such matters fall within the jurisdiction of the Department of Labor, and shall be given the address of the appropriate Regional Director of the Wage and Hour and Public Contracts Divisions of the Department of Labor.

Subpart H—Nondiscrimination in Employment

§ 12.801 Policy.

The President has stated that the policy of the Government is to promote equal employment opportunity for all qualified persons employed or seeking employment on Government contracts because such persons are entitled to fair and equitable treatment in all aspects of employment on work paid for from public funds, and that contracting agencies and Government contractors are obligated to insure compliance with, and successful execution of, the equal employment opportunity program of the Government. In stating this policy, the President has directed that the head of each contracting agency shall be primarily responsible for obtaining compliance by any contractor or subcontractor and shall take the appropriate measures to bring about compliance. The President's Committee on Government Contracts provides guidance to contracting agencies concerning the program. The Committee has announced that the objectives of the program can best be achieved through the processes of education, persuasion, mediation, and conciliation. (Executive Orders 8802 of June 25, 1941, 9346 of May 27, 1943, 10479 of August 13, 1953, and 10557 of September 3, 1954.) However, when those methods do not bring the proper results, a firmer approach should be adopted. Additional measures should include consideration, prior to an award, of whether a prospective contractor appears to be able to conform to the requirements of the standard nondiscrimination clause. (See §§ 1.903–1(f) and 1.604–2.)

§ 12.802 Basic requirement.

Contracts entered into by the Departments, except as set forth in § 12.804, shall contain the following clause:

NONDISCRIMINATION IN EMPLOYMENT
(SEPT. 1954)

(a) In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: employment, upgrading, demotion/or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of the nondiscrimination clause.

(b) The Contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

§ 12.803 Applicability.

The nondiscrimination requirements are applicable to contracts and first-tier subcontracts as herein provided.

(a) The clause set forth in § 12.802 shall be included in all contracts involving the employment of labor, except:

(1) The clause shall not be included in—

(i) Contracts to be performed outside the United States where no recruitment of workers within the United States is involved;

(ii) Contracts to meet special requirements or emergencies, if recommended by the President's Committee on Government Contracts (see § 12.804); and

(iii) Purchase orders on Standard Form 44.

(2) The clause shall be modified in—

(i) Purchase orders for $2,500 or less which are not within the above exceptions, by deleting the last sentence of paragraph (a) and all of paragraph (b).

(ii) Contracts for $5,000 or less, other than purchase orders for $2,500 or less, by deleting the last sentence of paragraph (a) when in the judgment of the contracting officer administration of the posting requirement of a clause is impracticable. For example, contracts for off-the-shelf items and contracts requiring delivery of supplies or performance of services within 60 days from the date of the contract.

(b) Notwithstanding paragraph (b) of the clause, a contractor is not required to insert any nondiscrimination clause in subcontracts of the kind described in paragraph (a) (1) (i) and (ii) of this section.

§ 12.804 Special requirements or emergencies.

Where special requirements or emergencies are such that use of the clause set forth in § 12.802 in a contract or subcontract is impracticable, the contracting officer may request authority to omit or modify the clause. Such requests shall be submitted in accordance with Departmental procedures, together with all pertinent facts, to the Assistant Secretary of Defense (Supply and Logistics), for coordination with the President's Committee on Government Contracts. Prior to the submission of requests for exemption, the Secretary or a designee for the purpose, will in appropriate cases personally discuss with the president of the company concerned the inclusion of the clause in the pending contract.

§ 12.805 Interpretations.

The President's Committee on Government Contracts has published the interpretations set forth below of Executive Orders 10479 and 10557.

(a) "Standard commercial supplies" means an article:

(1) Which in the normal course of business is customarily manufactured for stock and is customarily maintained in stock by the manufacturer or by any distributor or other commercial dealer for the marketing of such article; or

(ii) Which is manufactured and sold by two or more persons for general commercial or industrial use or which is identical in every material respect with an article so manufactured and sold.

(b) The obligation to include the nondiscrimination clause does not depend on the amount of money or other consideration involved in the performance of the contract.

(c) Inclusion of the nondiscrimination clause is not required in contracts the performance of which does not involve the employment of persons.

(d) The nondiscrimination clause does not refer to, extend to, or cover the activities or business of the contractor which are not related to, or involved in, the performance of the contract entered into.

(e) The obligation to include the nondiscrimination clause exists even though the contract is required to be awarded to the lowest responsible bidder.

(f) The obligation to include the nondiscrimination clause exists even though the contract is between the Federal Government and a State agency or subdivision of a State.

§ 12.806 Administration.

§ 12.806–1 General.

The President's Committee on Government Contracts has published "A Manual for the Guidance of Personnel Engaged in Obtaining Compliance with the National Equal Job Opportunity Program" which contains information for all who are engaged in obtaining compliance with the Federal nondiscrimination clause. This publication is to be employed as additional guidance in the overall administration of the nondiscrimination program.

§ 12.806–2 Educational responsibility.

(a) Contracting officers and other personnel concerned with procurement shall, in accordance with Departmental procedures, be apprised of their responsibility in obtaining compliance with the nondiscrimination clause.

(b) The Departments shall publicize the nondiscrimination policy to prospective contractors and shall make available to contractors information concerning their responsibilities under the nondiscrimination clause.

§ 12.806–3 Posting of notices.

In all instances, except where the nondiscrimination clause may have been modified as authorized by § 12.803(a)(2), contracting officers shall furnish to contractors copies of the notice entitled "Equal Economic Opportunity" (U. S. Government Printing Office: 1954 O–300378 or 1955 O–364036), which shall be obtained by contracting officers in accordance with Departmental procedures. Contractors shall obtain from the contracting officer copies for first-tier subcontractors.

§ 12.806–4 Compliance reviews.

(a) Both routine and special compliance reviews shall be conducted in accordance with Departmental proce-

dures to ascertain the extent to which contractors are complying with the provisions of the nondiscrimination clause and to furnish educational data in connection with the program.

(b) A routine compliance review consists of a brief review of the practices of the contractor to ascertain compliance with the requirements of the clause. This type of review shall include a verification that the notice is appropriately posted and that the clause is included in subcontracts where required. A routine compliance review shall be considered a normal part of contract administration.

(c) A special compliance review consists of a comprehensive review of the employment practices of the contractor with respect to the requirements of the nondiscrimination clause. In addition to discussions with management, personnel conducting special compliance reviews should, when appropriate, discuss the contractor's employment practices with employment sources, minority groups, and interested civic groups. Special compliance reviews shall be conducted (1) from time to time, (2) when special circumstances warrant, and (3) when requested by proper authority.

§ 12.806–5 Complaints.

The Departments will promptly investigate complaints based upon alleged noncompliance with the provisions of the nondiscrimination clause, provided such complaints contain the following identifying information:

(a) The name and address of the contractor or subcontractor alleged to have violated the provisions of the nondiscrimination clause;

(b) A description of the acts believed to be in violation of the nondiscrimination clause, including, where known, names of contractor's personnel involved, and dates of alleged incidents;

(c) The name and address of each person who believes himself aggrieved by the alleged violation of the clause; and

(d) Other pertinent information which will assist investigation and resolution of the complaint.

§ 12.806–6 Incomplete complaints.

To avoid unwarranted investigation of allegations which do not provide the essential information set forth in § 12.806–5, Departments may return such allegations to the originating source, specifying the additional information required.

§ 12.806–7 Processing of complaints.

Complaints may be submitted to the President's Committee on Government Contracts, the Secretary of Defense, or the Military Departments. Complaints submitted to the Military Departments in accordance with § 12.806–5, and determined to involve a Government contract or subcontract, shall be processed in accordance with Departmental procedure which will assure:

(a) Prompt investigation of statements and allegations contained in the complaint. Such investigations should include, where necessary, (1) a review of the pertinent personnel practice of the contractor or subcontractor concerned, (2) the circumstance under which the discriminatory action is alleged to have taken place, and (3) such other factors which may determine whether the contractor or subcontractor in the particular case complied with the provisions of the nondiscrimination clause set forth in the contract concerned.

(b) Resolution of complaints by conciliatory means whenever possible.

(c) The preparation and submission, through prescribed channels, of a report to the President's Committee on Government Contracts setting forth (1) a copy of the complaint together with a summary of the investigative action performed by the Department concerned, (2) corrective action taken or recommended by the Department where investigation discloses a need for such action, (3) recommendations or comments in connection with the complaints which investigation disclosed as unfounded, and (4) information that the Department considers should be brought to the attention of the President's Committee.

§ 12.806–8 Reporting channels.

Reports in connection with complaints shall be forwarded, in duplicate, through Departmental channels to the Assistant Secretary of Defense (Supply and Logistics) for transmittal to the President's Committee on Government Contracts.

§ 12.807 Contact with the President's Committee.

After receiving a complaint of discriminatory employment practices against a contractor it may be appropriate for investigative personnel to contact the Regional Office of the President's Committee on Government Contracts, if there is one in the area, to ascertain if that office has additional information concerning the complaint or contractor. The Regional Office may be used as a point of information. However, contact concerning the conduct of or any other matters pertaining to the investigation shall not be made except after coordination with Departmental headquarters.

Subpart I—Employment Restrictions for Security Purposes

§ 12.901 Restrictions on hiring of aliens and other individuals.

It shall be the policy of each Department, in the interest of safeguarding the national security, to require written consent of the Secretary of the Department concerned (in accordance with procedures prescribed by that Department) prior to (a) the employment of any alien on any contract classified "Top Secret," "Secret," or "Confidential," and (b) the employment of any individual on any Top Secret or Secret contract.

§ 12.902 Responsibilities of contractors to employees.

In connection with all classified contracts, it shall be the policy of each Department to require that a contractor will be responsible for furnishing to the Contracting Officer (a) any requested information with respect to his employees, and (b) information and reports regarding any subversive activities of his employees.

§ 12.903 Contracts classified "Atomic Energy Restricted."

Employment restrictions with respect to any contract classified "Atomic Energy Restricted" shall be in accordance with regulations of the Atomic Energy Commission and procedures prescribed by each respective Department.

PART 13—GOVERNMENT PROPERTY

Sec.
13.000 Scope of part.

Subpart A—General

13.100 Scope of subpart.
13.101 Definitions.
13.101–1 Property.
13.101–2 Government property.
13.101–3 Contractor-furnished property.
13.101–4 Material.
13.101–5 Special tooling.
13.101–6 Industrial facility.
13.101–7 Industrial property.
13.101–8 Non-severable industrial facility.
13.101–9 Plant equipment.
13.101–10 Production equipment.
13.101–11 Machine tools.
13.101–12 Accessory item.
13.101–13 Auxiliary item.
13.101–14 Salvage.
13.101–15 Scrap.
13.101–16 Facilities contract.
13.101–17 Educational or other nonprofit organization.
13.102 General policy.
13.102–1 Materials.
13.102–2 Special tooling.
13.102–3 Facilities.
13.103 Control of Government property.
13.104 Responsibility and liability for Government property.
13.104–1 Responsibility of prime contractors for Government property.
13.104–2 Liability of subcontractors for Government property.

Subpart B—Material

13.200 Scope of subpart.
13.201 Fixed-price contracts.
13.202 Cost-reimbursement type contracts.
13.203 Disposal.

Subpart C—Special Tooling

13.300 Scope of subpart.
13.301 Fixed-price procurement; Government-furnished special tooling.
13.302 Fixed-price procurement—contractor-furnished or acquired special tooling.
13.303 Fixed-priced procurement—General policy on acquiring special tooling.
13.304 Fixed-price procurement; special tooling furnished or acquired by subcontractors.
13.305 Cost-reimbursement type (Government-furnished special tooling).
13.306 Fixed-price and cost-reimbursement type—special consideration for tooling with commercial use.

Subpart D—Industrial Facilities

Sec.
13.400 Scope of subpart.
13.401 Award of supply contracts.
13.402 Separate facilities contract.
13.403 Single facilities contract.
13.404 [Reserved]
13.405 Title.
13.406 Nonseverable industrial facilities.
13.406–1 Nondisposable nonseverable facilities.
13.406–2 Abandonment of facilities and restoration of premises.
13.407 Right of contractor to use.
13.408 Maintenance.
13.409 Identification and records.
13.410 Late delivery, diversion and substitution.
13.411 Risk of loss or damage and liability.
14.412 Unusable or unneeded facilities.
13.413 Termination of facilities contracts.
13.413–1 Termination by the Government.
13.413–2 Termination by the contractor.
13.414 Standby provisions.
13.415 Disposition.

Subpart E—Contract Clauses

13.500 Scope of subpart.
13.501 Applicability.
13.502 Government-furnished property clause for fixed-price contracts.
13.503 Government property clause for cost-reimbursement type contracts.
13.504 Special tooling clause for fixed-price contracts.
13.505 Government-furnished property clause for fixed-price type contracts with non-profit institutions.
13.506 Government property clauses for cost-reimbursement type research and development contracts with non-profit institutions.

Subpart F—Use of Government Owned Industrial Facilities on Work Other Than for a Military Department

13.600 Scope of subpart.
13.601 Rental.
13.601–1 General.
13.601–2 Rental rates.
13.601–3 Exceptions.
13.602 Term of use.
13.603 Production equipment.

Subpart G—Use of Government-Owned Industrial Facilities and Special Tooling on Work for Foreign Governments

13.700 Scope of subpart.
13.701 Use without charge.

Subpart H—Transfer of Title to Equipment to Nonprofit Education or Research Institution

Sec.
13.800 Scope of subpart.
13.801 Purpose of the legislation.
13.802 Transfer of title.
13.803 Contract clauses.

AUTHORITY: §§ 13.000 to 13.803 issued under R. S. 161, sec. 2202, 70A Stat. 120; 5 U. S. C. 22, 10 U. S. C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U. S. C. 2301–2314.

§ 13.000 Scope of part.

This part sets forth the general policies of the Departments with respect to providing property for use by contractors in connection with procurement by the Military Departments and sets forth applicable contract clauses.

Subpart A—General

§ 13.100 Scope of subpart.

This subpart contains definitions of terms used in this part and a statement of general policy.

§ 13.101 Definitions.

As used in this part, the following terms have the meaning stated below:

§ 13.101–1 Property.

Property includes all physical property, both real and personal. For the purpose of this part, it consists of and is treated under three separate categories—material, special tooling, and industrial facilities.

§ 13.101–2 Government property.

"Government property" means all property owned by or leased to the Government, or acquired by the Government under the terms of a contract; except that property to which the Government has acquired a lien or title solely as a result of partial, advance or progress payments shall not for the purpose of this Section be classified as Government property. With this exception, Government property includes both Government-furnished property and contractor-acquired property as defined below:

(a) *Government-furnished property.* "Government-furnished property" is property in the possession of or acquired directly by the Government and subsequently delivered or otherwise made available to the contractor; and

(b) *Contractor-acquired property* "Contractor-acquired property" is property procured or otherwise provided by the contractor for the performance of a contract, pursuant to the terms of which title is vested in the Government.

The term "provide," as used in the context of such phrases as "Government property provided to the contractor" and "Government-provided property," is intended to include both Government-furnished property and contractor-acquired property.

§ 13.101–3 Contractor-furnished property.

"Contractor-furnished property" means all property used by the contractor in the performance of a contract, other than Government property.

§ 13.101–4 Material.

"Material" means property which may be incorporated into or attached to an end item to be delivered under a contract or which may be consumed or expended in the performance of a contract. It includes, but is not limited to, raw and processed material, parts, components, assemblies, and small tools and supplies which may be consumed in normal use in the performance of the contract.

§ 13.101–5 Special tooling.

"Special tooling" means all jigs, dies, fixtures, molds, patterns, special taps, special gauges, special test equipment, other special equipment and manufacturing aids, and replacements thereof, acquired or manufactured by the contractor for use in the performance of a contract, which are of such a specialized nature that, without substantial modification or alteration, their use is limited to the production of such supplies or parts thereof, or the performance of such services, as are peculiar to the needs of the Government. The term does not include: (a) Items of tooling or equipment acquired by the contractor prior to the contract, or replacements thereof, whether or not altered or adapted for use in the performance of the contract, (b) consumable small tools, or (c) general or special machine tools, or similar capital items.

§ 13.101–6 Industrial facility.

"Industrial facility" means property, other than material and special tooling, of use for the performance of a contract

or subcontract, including real property and rights therein, building, structures, improvements, and plant equipment.

§ 13.101–7 Industrial property.

"Industrial property," as distinguished from military property, means any contractor-acquired or Government-furnished property, including materials, special tooling, and industrial facilities furnished or acquired in the performance of a contract or subcontract.

§ 13.101–8 Non-severable industrial facility.

"Non-severable industrial facility" means an industrial facility which, after erection or installation, cannot be removed without substantial loss of value or damage thereto, or to the premises where installed.

§ 13.101–9 Plant equipment.

"Plant equipment" means personal property of a capital nature (consisting of machinery, equipment, furniture, vehicles, machine tools, and accessory and auxiliary items, but excluding special tooling) used or capable of use in the manufacture of supplies or in the performance of services or for any administrative or general plant purpose.

§ 13.101–10 Production equipment.

"Production equipment" means those items of plant equipment located within a manufacturing, processing, assembly or service establishment and used for cutting, abrading, grinding, shaping, forming, joining, measuring, testing, heating or treating production materials or work in process.

§ 13.101–11 Machine tools.

"Machine tools" mean those items of production equipment which are power-driven, non-portable machines used for cutting, abrading, grinding, shaping or forming metal.

§ 13.101–12 Accessory item.

"Accessory item" means an item which facilitates or enhances the operation of plant equipment but which is not essential for its operation, such as remote control devices.

§ 13.101–13 Auxiliary item.

"Auxiliary item" means an item without which the basic unit of plant equipment cannot operate, such as motors for pumps and machine tools.

§ 13.101–14 Salvage.

"Salvage" means property recoverable for further use or which, because of its worn, damaged, deteriorated, or incomplete condition, or specialized nature, has no reasonable prospect of sale or use as serviceable property without major repairs or alterations but which has some value in excess of its scrap value.

§ 13.101–15 Scrap.

"Scrap" means property that has no reasonable prospect of being sold except for the recovery value of its basic material content.

§ 13.101–16 Facilities contract.

"Facilities contract" means a contract under which industrial facilities are provided by the Government for use in connection with the performance of a separate contract or contracts for supplies or services.

§ 13.101–17 Educational or other nonprofit organization.

"Educational or other nonprofit organization" means any corporation, foundation, trust, or institution operated for scientific or educational purposes, not organized for profit, no part of the net earnings of which inures to the profit of any private shareholder or individual.

§ 13.102 General policy.

§ 13.102–1 Materials.

It is the general policy of the Armed Services that contractors will furnish all materials required for the performance of Government contracts. Exceptions to this policy may be made by a procuring activity when it is determined that it will be in the best interest of the Government to furnish materials in a particular case, or with respect to a particular type of procurement, by reason of economy, standardization, expediting production, or other circumstances.

§ 13.102–2 Special tooling.

It is the general policy of the Armed Services that a Department shall furnish special tooling under its control and determined by it to be available, when such furnishing does not interfere with essential production or program schedules and the cost of such furnishing is less than the cost to the Government of the contractor acquiring or furnishing new special tooling. In determining the cost to the Government of furnishing special tooling to a contractor, consideration shall be given to:

(a) The cost of the preparation of such special tooling and the shipment thereof to the plant of the contractor;

(b) The cost of adapting such special tooling to meet the requirements of the contract;

(c) The cost incident to any delays which may be occasioned; and

(d) The cost of new special tooling.

§ 13.102–3 Facilities.

(a) It is the general policy of the Department of Defense that contractors will furnish all facilities required for the performance of Government contracts. However, subject to and within the limitations of existing authority, facilities may be provided by the Government for use by contractors when such providing is considered necessary to meet essential production or program schedules, or when otherwise considered by the Secretary concerned to be in the best interest of the Government. Before any Government facilities are furnished to a contractor, careful consideration must be given to the full utilization of subcontractors possessing adequate and available capacity to meet military production requirements.

(b) Each contract, lease, or other agreement which provides Government-owned industrial facilities (1) shall require periodic payment or credit of rent or use charge, or (2) where such facilities are provided by the Government without charge, (i) shall provide that no charge for the use of such facilities shall be included in the price or prices of Government supply or service contracts for which such facilities are used and, (ii) shall be documented to show the supply and service contracts for which such facilities are used on the basis of no charge being made in the supply or service contract price or prices. The agreement shall specify rental or use charge as a periodic dollar amount or, where this is inappropriate under the circumstances, it shall set forth the method of computing the amount due. In any case where transportation or installation costs are borne by the Government, such costs shall, for purpose of determining the rental payment, be added to the "acquisition cost" of the facilities in accordance with § 13.601–2. In pricing supply and service contracts for which the use of such facilities is authorized on a no-charge basis, care must be taken to screen out any element of cost—whether direct or indirect—on account of rentals charged for such facilities under other supply or service contracts.

§ 13.103 Control of Government property.

The "Manual for Control of Government Property in Possession of Contractors", § 30.2 of this subchapter, and the "Manual for Control of Government Property in Possession of non-Profit Research and Development Contractors", § 30.3 of this subchapter, are incorporated into this subchapter and made a part thereof.

§ 13.104 Responsibility and liability for Government property.

§ 13.104–1 Responsibility of prime contractors for Government property.

Except with respect to advertised fixed-price contracts, it is the basic policy of the Government not to hold the prime contractor responsible for loss of or damage to Government property caused by certain perils. This policy, as applied in facilities contracts, is set forth in § 13.411, and as implemented for use in other types of contracts, is contained in contract clauses set forth in Subpart E, of this part.

§ 13.104–2 Liability of subcontractors for Government property.

The prime contractor shall be required to hold a subcontractor liable for loss or destruction of or damage to Government property in the possession or control of such subcontractor (the prime contractor, nevertheless, remaining responsible to the Government to maintain the records required by Appendix B or Appendix C of Part 30 of this subchapter: *Provided, however,* That—

(a) A prime contractor on a negotiated fixed-price basis may, with the prior approval of the Contracting Officer, include in any subcontracts thereunder provisions similar to those contained in § 13.502 (f) and designated for use in negotiated fixed-price contracts, with respect to Government property previously furnished to the prime contractor but in the possession or control of the subcontractor, and

(b) A prime contractor on a cost-reimbursement basis may, with the prior

approval of the Contracting Officer, (1) include in any cost-reimbursement type subcontract thereunder provisions similar to those contained in § 13.503 (f), with respect to Government property in the possession or control of such subcontractor, and (2) include in any fixed-price subcontract thereunder provisions similar to those contained in § 13.502 (f) and designated for use in negotiated fixed-price contracts, with respect to Government property in the possession or control of such subcontractor: *Provided, however*, That whenever a fixed-price subcontract intervenes between the prime contractor and a subcontractor on a cost-reimbursement basis, the provisions so included shall be those referred to in subparagraph (2) of this paragraph.

Contracting Officers shall, prior to approving the inclusion in any subcontract of the provisions referred to in this section, satisfy themselves that the degree of protection and care to be afforded Government property in the possession or control of any such subcontractor is sufficient at all times to protect the interests of the Government.

Subpart B—Material

§ 13.200 Scope of subpart.

This subpart sets forth policies governing material furnished by a Military Department in connection with the performance of contracts for supplies or services.

§ 13.201 Fixed-price contracts.

Where supplies or services are contracted for on a fixed-price basis, material may be furnished to the contractor by a Military Department in accordance with the policy stated in §§ 13.102 to 13.102–3. Where a contract is to be entered into as a result of formal advertising, material to be furnished by the Government shall be set forth in the Invitation for Bids. At any time after a fixed-price contract has been entered into, whether as a result of formal advertising or negotiation, the contract may be amended by the parties to provide for the furnishing of Government material or to increase the amount to be furnished, provided the Government receives adequate consideration for such amendment. Pursuant to the clause set forth in § 13.502, the Government may decrease the material furnished or to be furnished under the contract, with equitable adjustment, if appropriate, in the delivery terms, price, or other contractual provisions affected thereby. When a Contracting Officer determines that a contemplated decrease in material would render it inequitable to require performance of the contract, in lieu of issuance of a notice in writing providing for such a decrease, he may, in accordance with departmental procedures, terminate the contract, in whole or in part, pursuant to the clause entitled "Termination for the Convenience of the Government."

§ 13.202 Cost-reimbursement type contracts.

Where supplies or services are contracted for on a cost-reimbursement basis, material may be furnished to the contractor by a Military Department in accordance with the policy stated in § 13.102. At any time after a cost-reimbursement type contract has been entered into, the contract may be amended by the parties to provide for the furnishing of Government material, or to increase or decrease the amount to be furnished under the contract, with equitable adjustment, if appropriate, in delivery terms, fixed-fee, or other contractual provisions affected thereby.

§ 13.203 Disposal.

Disposal of residual Government material shall be in accordance with applicable regulations issued by the Military Departments pursuant to the Federal Property and Administrative Services Act of 1949.

Subpart C—Special Tooling

§ 13.300 Scope of subpart.

This subpart sets forth policies governing the acquisition, furnishing and disposition of special tooling required for the performance of contracts for supplies or services.

§ 13.301 Fixed-price procurement; Government-furnished special tooling.

Where supplies or services are contracted for on a fixed-price basis special tooling required for performance of the contract may be furnished to the contractor by a Military Department in accordance with the policy stated in § 13.102–2. Where a contract is to be entered into as a result of formal advertising, special tooling to be furnished by the Government shall be stated in the Invitation for Bids. At any time after a fixed-price contract has been entered into, whether as a result of formal advertising or negotiation, the contract may be amended by the parties to provide for the furnishing by the Government of special tooling, or to increase the Government-furnished special tooling, provided such furnishing or increase is for the benefit of the Government and the Government receives adequate consideration for such amendment. Pursuant to the clause set forth in § 13.502, the Government may decrease the special tooling furnished or to be furnished under the contract, with equitable adjustment, if appropriate, in the delivery terms, price, or other contractual provisions affected thereby. When a Contracting Officer determines that a contemplated decrease in special tooling would render it inequitable to require performance of the contract, in lieu of issuance of a notice in writing providing for such a decrease, he may, in accordance with departmental procedures, terminate the contract, in whole or in part, pursuant to the clause entitled "Termination for the Convenience of the Government."

§ 13.302 Fixed-price procurement—contractor-furnished or acquired special tooling.

Where special tooling required for the performance of a fixed-price contract for supplies or services is not furnished by the Government, newly made or acquired special tooling may be furnished or acquired by the contractor under one of the following arrangements:

(a) The contract may provide for the acquisition of such special tooling by the contractor and the delivery thereof to the Government as an end item under the contract. In any such case, the rights of the parties in special tooling shall be governed by the provisions of the contract and the Schedule; or

(b) Where the contract does not provide for delivery of such special tooling as an end item under the contract, the clause set forth in § 13.504 shall be used.

§ 13.303 Fixed-price procurement—general policy on acquiring special tooling.

In deciding whether special tooling should be acquired by the Government as a separate end item under the contract or Schedule, or in exercising the Government's rights under the special tooling clause set forth in § 13.504, the contracting officer shall take into consideration the following factors:

(a) The current or probable future need of the Government for the items of special tooling involved;

(b) The residual value of such items;

(c) Administrative and other expense incident to preparation, handling and storage of such items;

(d) The probable cost of reproduction of such items in event of future procurement;

(e) The probable cost of making such items available in the event of future procurement, and the probable reduction in price of such future procurement; and

(f) The amount offered by the contractor for the right to retain such items.

§ 13.304 Fixed-price procurement; special tooling furnished or acquired by subcontractors.

(a) In the event the prime contractor enters into subcontracts or issues any purchase orders, the performance of which involves the use of special tooling to be furnished or acquired by the subcontractor or vendor, there will be included in such subcontracts or purchase orders appropriate provisions to the extent required by paragraph (k) (or by alternate paragraph (k)) of the special tooling clause set forth in § 13.504 giving the prime contractor rights comparable to those granted to the Government by such clause.

(b) The prime contractor shall exercise his rights in such special tooling for the benefit of the Government in accordance with any directions issued by the Contracting Officer, who shall be guided by the policies set forth in § 13.303.

§ 13.305 Cost-reimbursement type (Government-furnished special tooling.)

Where supplies or services are contracted for on a cost-reimbursement basis, special tooling may be furnished to the contractor by a Military Department in accordance with the policy stated in § 13.102–2. At any time after a cost-reimbursement type contract has been entered into, the contract may be amended by the parties to provide for the furnishing by the Government of special tooling, or to increase or decrease the amount to be furnished un-

der the contract, with equitable adjustment, if appropriate, in delivery terms, fixed-fee, or other contractual provisions affected thereby. Special tooling furnished by the Government or acquired by the Contractor shall be subject to the provisions of the Government Property Clause set forth in § 13.503.

§ 13.306 Fixed-price and cost-reimbursement type—special consideration for tooling with commercial use.

When performance of a fixed-price or cost-reimbursement type contract requires a contractor to acquire tooling which would be special tooling as defined in § 13.101–5, except that it has commercial use, the contract may appropriately provide therefor, giving due consideration to the best interests of the Government and the equities of the contractor.

Subpart D—Industrial Facilities

§ 13.400 Scope of subpart.

This subpart sets forth policies with respect to providing industrial facilities for use by contractors in connection with procurement by the Military Departments and for other incidental uses. Nothing in this Subpart D shall be construed as affecting any authority granted under Departmental procedures to employ a lease as a means of making property available to a contractor for performing Government work.

§ 13.401 Award of supply contracts.

Contracts for supplies or services based upon the use of industrial facilities to be provided by the Government should not be awarded until the scope and magnitude of the facilities required have been determined and authorized by the Department concerned.

§ 13.402 Separate facilities contract.

Industrial facilities shall be provided only under a facilities contract separate from any related contract for supplies or services, except that industrial facilities may be provided under suitable clauses in a supply or service contract which incorporates the applicable provisions of this Subpart D.

(a) When the cumulative total acquisition cost (actual or estimated) of the industrial facilities provided to a contractor at one plant or general location does not exceed $50,000;

(b) When the contract is for the performance of construction work;

(c) When the contract is for the performance of work within establishments or installations operated by the Government; or

(d) When the contract is for the performance of services, involving the operation of a Government-owned plant or installation, for a specified period of time, and the facilities provided are to be used only in connection with such contract.

§ 13.403 Single facilities contract.

Except as otherwise provided under § 13.402, or unless in accordance with departmental procedures the Contracting Officer determines it to be impracticable, all industrial facilities provided by a procuring activity for use by a Contractor at any one plant or general location shall be governed by a single facilities contract, amended from time to time as necessary, covering only the facilities at that plant or general location, except that the Contracting Officer may authorize the temporary use of a portion of the facilities at a location other than that covered by the contract. Except as provided in this section and except for facilities for the performance of subcontracts under construction contracts or under contracts for work within establishments or installations operated by the Government, industrial facilities provided to a subcontractor shall be provided pursuant to a separate contract or lease between the Government and the subcontractor.

§ 13.404 [Reserved]

§ 13.405 Title.

Each facilities contract shall provide that title to all industrial facilities furnished to the contractor shall remain in the Government, and that title to industrial facilities acquired by a contractor the cost of which is reimbursable to the contractor shall vest in the Government at the earliest practicable time.

§ 13.406 Nonseverable industrial facilities.

It is the policy of the Department of Defense that nonseverable industrial facilities shall be located on land owned or controlled by the Government, unless the head of a procuring activity determines that such location is not feasible. If the head of a procuring activity determines that location on land not owned or controlled by the Government is necessary he may authorize such location, subject to the limitations set forth in § 13.406–1. In determining whether to authorize such location, consideration shall be given to any nonrecoverable costs involved.

§ 13.406–1 Nondisposable nonseverable facilities.

Nonseverable industrial facilities which are of such a nature as not to be disposable to third parties (other than the contractor) for commercial or industrial operations, after the Government's need therefor has ceased, may be located on other than Government owned or controlled land only under the following circumstances:

(a) The contractor agrees (to the extent authorized by law) that he will purchase the facilities upon the expiration of the facilities contract, or at any time prior thereto, at a price equal to the acquisition cost of the facilities less depreciation at the rate or rates specified in the facilities contract (which rate or rates shall take into consideration the estimated useful life of the facilities), or credit an amount equal to such price against any amounts due the contractor under the facilities contract; or

(b) The estimated useful life of the facilities will not extend beyond the expiration of the facilities contract or the completion of the work for which the facilities were provided; or

(c) The Secretary concerned specifically approves other provisions as being in the interest of national defense.

§ 13.406–2 Abandonment of facilities and restoration of premises.

The Government shall have the right to abandon in place all such nonseverable industrial facilities located on land not owned or controlled by it, and in such event shall not be subject to any obligation to restore or rehabilitate the premises of the contractor, unless otherwise provided in the contract with the prior approval of the head of a procuring activity. The authority of the head of a procuring activity to grant such approval shall not be delegated.

§ 13.407 Right of contractor to use.

(a)(1) Each facilities contract shall limit the right of the contractor to use the industrial facilities to the performance of the contracts and subcontracts specified or otherwise identified in the facilities contract, added thereto by amendment, or approved in writing by the Contracting Officer cognizant of the facilities contract. In the latter event, a record of approved contracts and subcontracts shall be included in the facilities contract file. Where a facilities contract authorizes the use of industrial facilities in the performance of contracts entered into by formal advertising, the facilities contract shall specify a cash rental to be paid in such cases. Facilities contracts may authorize the use of industrial facilities without charge in the performance of contracts other than those entered into by formal advertising if—

(i) The user is not thereby placed in a favored competitive position; and

(ii) The Government receives adequate consideration through reduced cost for supplies or services or otherwise (see § 13.601–1). Such reduced cost may be established in the initial negotiation of new contracts, or by the readjustment of prices (including fixed-fees and allowable costs) of existing contracts, or by price redetermination in the case of negotiated fixed-price contracts where the saving to the contractor cannot be accurately forecast.

(2) Where a facilities contract authorizes the use of industrial facilities without charge to perform subcontracts, it is likewise important to assure that the waiver of a use charge is consistent with the requirements that (i) the subcontractor is not thereby placed in a favored competitive position and (ii) the Government receives adequate consideration through reduced cost for the supplies or services or otherwise (see § 13.601–1); therefore, the use of industrial facilities without charge to perform a particular subcontract shall not be authorized unless the contracting officer determines that these requirements are met.

(3) In order to insure that a concern possessing Government facilities without charge is not thereby placed in a favored position in competing for Government business, either as a prime contractor or a subcontractor, with relation to concerns possessing either a lesser amount of Government facilities or their own facilities, a suitable method for eliminat-

ing any competitive pricing advantage shall be employed. This may be accomplished (i) by charging a rental in a manner prescribed in this Part 13, or (ii) in the price evaluation of competitive proposals, by adding to the proposed contract price of a concern possessing Government facilities without charge an evaluation factor consisting of an amount which it is estimated would equal such rental charge, or (iii) by any other available method which will give effect to the basic policy set forth in this § 13.407 under the facts of the particular case. It is recognized that there may be situations in which there is no need for charging rental or applying equalization factors to assure that the user possessing Government facilities is not thereby placed in a favored competitive position, as, for example, where the only competing concerns possess substantially the same amount of Government facilities on a no-charge basis for use in the performance of a proposed contract, or where the procurement is to be made from a sole source, or where the award is to be made on a basis in which the rental cost of Government-owned facilities is not a controlling factor. Where one of the methods authorized by this section is used to eliminate competitive advantage in the award of a contract for supplies or services, the contract file shall be documented to show the method employed.

(4) Varying methods or techniques may be required to achieve equalization of competitive advantage in different industries or commodity areas, or by reason of the complexity of the facility pattern in contractors' plants, or other considerations. Whatever method or technique is used, it should conform to the basic policy of eliminating competitive advantage in pricing, and should do so in a manner consistent with the rental policy and considerations applicable to the use by contractors of Government facilities. Each Department shall adopt such procedures of administration and review as will accomplish the foregoing objectives.

(b) When use without charge to the contractor is not authorized by (a) above or is not advisable because of the competitive aspect, administrative difficulties, or other considerations, the contract shall require the contractor to pay a fair and reasonable use charge. Such fair and reasonable use charge shall be established on the basis of sound commercial practice, including any prevailing commercial rates, and shall be such as to prevent the contractor from obtaining an unfair competitive advantage by reason thereof. The use charge for production equipment and for other personal property and equipment constituting industrial facilities shall conform to the rates prescribed in § 13.601.

(c) A facilities contract may also provide that the contractor may be authorized by the contracting officer to make incidental use of all or part of the facilities covered by the contract for work other than for an agency of the Department of Defense. However, where a facilities contract is no longer required in connection with the performance of a Government contract or contracts, it shall not be continued solely for the purpose of authorizing commercial use of all or any part of the facilities covered by the facilities contract. The rental rates applicable to Government facilities as provided in § 13.601, shall apply to facilities furnished under a facilities contract for the period that such facilities are authorized for use for commercial purposes.

§ 13.408 Maintenance.

Each facilities contract shall require the contractor, without cost to the Government thereunder, to protect, preserve, maintain, and repair the facilities provided thereunder, in accordance with sound industrial practice, until relieved of responsibility therefor. However, when authorized by the Department concerned, such contract may provide for:

(a) A specified degree of protection, preservation, maintenance and repair that is less than sound industrial practice as to any part or parts of the facilities as are determined by the Department concerned to be nonessential to future utilization of the facilities as a whole;

(b) Reimbursement by the Government for the cost of protecting, maintaining, preserving and repairing facilities not authorized for use by the contractor; and

(c) Reimbursement by the Government for repairs, replacements, and restoration performed by the contractor when such repairs, replacements and restoration are in excess of normal maintenance and are directed or approved by the contracting officer.

The facilities contract shall contain no warranty, express or implied, regarding the condition or fitness for use of any item of industrial facilities. Nothing in this section shall limit a contractor's rights with respect to costs properly allowable under other contracts.

§ 13.409 Identification and records.

Each facilities contract under which industrial facilities are provided by the Government shall require the contractor, without cost to the Government thereunder, to maintain adequate property control records and a system of identification of such industrial facilities in accordance with the provisions of the "Manual for Control of Government Property in Possession of Contractors," (§ 30.2 of this subchapter) as in effect on the date of the contract, and in the case of facilities furnished to non-profit research and development contractors, in accordance with the provisions of the "Manual for Control of Government Property in Possession of Non-Profit Research and Development Contractors", (§ 30.3 of this subchapter) as in effect on the date of the contract. Nothing in this paragraph shall limit a contractor's rights with respect to costs properly allocable under other contracts.

§ 13.410 Late delivery, diversion and substitution.

Each facilities contract shall provide that:

(a) The Government shall not be liable to the contractor for damages or loss of profit by reason of non-delivery or of any delay in the delivery of industrial facilities to be provided by the Government. Provisions for appropriate equitable adjustment should be made in supply or service contracts which may be affected by any such non-delivery or delay.

(b) The Government shall have the right, when it is determined by the Department concerned to be in the best interest of the Government, to direct:

(1) Delivery of any industrial facility or facilities acquired by or furnished to the contractor under the contract to locations other than those specified in the contract; and

(2) Assignment, to the Government or to third parties, of purchase orders or subcontracts of the contractor for any industrial facility or facilities covered by the contract.

Provisions for appropriate equitable adjustment should be made in supply or service contracts which may be affected by such changes or modifications.

(c) The Government shall have the right to furnish any of the industrial facilities, in lieu of acquisition thereof by the contractor. Provisions will be made for reimbursement to the contractor, in such event, of proper costs incurred by it in connection with acquiring such facilities, including the cost of terminating purchase orders of subcontracts therefor.

§ 13.411 Risk of loss or damage and liability.

Each facilities contract—

(a) Shall provide that the Contractor shall not be liable for any loss or damage to the industrial facilities, or for expenses incidental to such loss or damage, except that the Contractor shall be responsible for any such loss or damage (including expenses incidental thereto):

(1) Which results from a risk expressly required to be insured under the facilities contract, but only to the extent of the insurance so required to be procured and maintained, or to the extent of insurance actually procured and maintained, whichever is greater;

(2) Which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of said insurance or reimbursement;

(3) Which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers, superintendents, or other equivalent representatives, who have supervision or direction of (i) all or substantially all of the Contractor's business, or (ii) all or substantially all of the Contractor's operations at the industrial facility if such facility is a complete plant or unit, or (iii) all or substantially all of the Contractor's operations at any one plant or separate location in which such industrial facilities are installed or located, or (iv) any separate or complete major industrial operation in connection with which the facilities are used; or

(4) Which results from a failure on the part of any of the Contractor's di-

rectors, officers, or other representatives mentioned in subparagraph (3) (iii) of this paragraph, (i) to maintain and administer, in accordance with sound industrial practices, a program for the maintenance, repair, protection and preservation of the industrial facilities, so as to insure their full availability and usefulness at all times, or (ii) to take all reasonable steps to comply with any appropriate written directions or instructions which the Contracting Officer may prescribe as reasonably necessary for the protection of the industrial facilities; provided, that, with respect to any such loss or damage caused by an excepted peril, the Contractor shall be liable under this subparagraph only where such failure of the Contractor's representative, as set forth herein, results from his willful misconduct or lack of good faith. As used in this section, the term "excepted peril" shall mean any peril set forth in paragraph (f) (i) (B) of the clause in § 13.502; and may also include additional provisions for liability in specific cases, in which case such additional provisions shall be included, or specifically referred to, in the general liability clause.

(b) Shall require the Contractor to hold the Government harmless against claims for injury to persons or damage to property of the Contractor or others arising from the Contractor's possession or use of the industrial facilities, provided, however, that so long as there is in effect one or more contracts for supplies or services which require the use of such facilities, the provisions of such contracts shall govern the assumption of liability for such claims arising out of or related to the performance of each such contract and involving the possession or use of Government provided industrial facilities.

(c) Shall require the Contractor to carry insurance in accordance with Part 10 of this subchapter.

Where justified by the circumstances of any particular contract, the Department concerned may require the Contractor to assume greater risks than those enumerated in paragraph (a) of this section.

§ 13.412 Unusable or unneeded facilities.

Each facilities contract shall provide that within 30 days after any industrial facility is determined by the contractor to be lost, damaged, destroyed, no longer usable, or no longer needed for the performance of Government contracts, the contractor shall notify the Contracting Officer thereof. Disposition of such damaged, destroyed, no longer usable or no longer needed facilities will be made in accordance with § 13.415.

§ 13.413 Termination of facilities contracts.

§ 13.413–1 Termination by the Government.

(a) Each facilities contract shall provide that the Government shall have the right, upon notice, to terminate such contract with respect to all or any part of the facilities covered thereby, or to terminate or limit the contractor's right to use any or all of such facilities. Provisions for equitable adjustment should be made in supply or service contracts which may be affected by such termination or limitation of right to use.

(b) A facilities contract shall be terminated by the Department concerned when the facilities covered thereby are no longer required for the performance of Government contracts, unless such termination is detrimental to the Government's interest. The contractor shall not be granted the unilateral right, at its election, to extend the time during which the contractor is entitled to use the equipment provided under the facilities contract.

§ 13.413–2 Termination by the contractor.

(a) Each facilities contract covering Government-furnished facilities shall provide that the contractor shall have the right to terminate the contract at any time, upon reasonable notice, with respect to all such facilities covered thereby, or, by agreement with the Contracting Officer, with respect to a substantial portion of such facilities.

(b) Termination at the option of the contractor shall not relieve the contractor of any of its obligations or liabilities under any supply or service contract affected thereby.

§ 13.414 Standby provisions.

A facilities contract may include appropriate provisions for maintenance or storage of the industrial facilities, or other suitable standby provisions, upon completion or termination in whole or in part of such contract or of the contractor's right to use any or all of the facilities covered thereby.

§ 13.415 Disposition.

Except as to those non-disposable, non-severable industrial facilities, for which specific provision is made in § 13.406, the disposition of industrial facilities shall be in accordance with applicable regulations issued by the Departments pursuant to statutory authority. Each facilities contract shall provide that within the period specified in the contract following the effective date of partial or complete termination, the contractor will account for all facilities with respect to which the contract is terminated. Within ninety (90) days after the contractor accounts for the facilities, the Contracting Officer will notify the contractor as to disposition thereof. The contractor will be required to prepare, protect, remove or ship the facilities as directed by the Contracting Officer. Provision may be made for equitable reimbursement to the contractor for expenses so incurred. If the Contracting Officer fails to notify the contractor as to disposition of the facilities within the ninety (90) day period, herein provided, the contractor may, upon reasonable notice to the Government, remove and store elsewhere at Government risk and expense those facilities located within the plant of the contractor.

Subpart E—Contract Clauses

§ 13.500 Scope of subpart.

This subpart sets forth uniform contract clauses pertaining to Government Property provided for use in connection with the performance of contracts for supplies or services.

§ 13.501 Applicability.

(a) As used in this subpart, the term "fixed-price contract for supplies or services" shall mean any contract (1) entered into either by formal advertising or by negotiation, but excluding purchase orders for $5,000 or less, letter contracts, letters of intent, notices of award and amendments or modifications to contracts or purchase orders; (2) at a fixed-price (with or without provisions for price redetermination, escalation, or other form of price adjustment) as covered in § 3.403 of this subchapter; and (3) for supplies or services other than the construction, alteration, or repair of buildings, bridges, roads, or other kinds of real property.

(b) As used in this subpart, the term "cost-reimbursement type contract for supplies or services" shall mean any contract (other than a letter contract, letter of intent, notice of award, or amendment or modification of a contract) entered into by negotiation on a cost or cost-plus-a-fixed-fee basis as covered in § 3.404, for supplies or services other than the construction, alteration, or repair of buildings, bridges, roads, or other kinds of real property.

§ 13.502 Government-furnished property clause for fixed-price contracts.

The following clause shall be used in fixed-price contracts for supplies or services (except contracts for experimental, developmental, or research work with educational or nonprofit institutions, where no profit to the contractor is contemplated) under which a Department is to furnish to the contractor, material, special tooling, or such industrial facilities as may be furnished under § 13.402 (a).

GOVERNMENT-FURNISHED PROPERTY
(MAY 1958)

(a) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-furnished Property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished Property suitable for use will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished Property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay occasioned the Contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by such delay, in accordance with the procedures provided for in the clause of this contract entitled "Changes." In the event the Government-

furnished Property is received by the Contractor in a condition not suitable for the intended use the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of the property, or (ii) effect repairs or modifications. Upon the completion of (i) or (ii) above, the Contracting Officer upon written request of the Contractor shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by the rejection or disposition, or the repair or modification, in accordance with the procedures provided for in the clause of this contract entitled "Changes." The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished Property or delivery of such property in a condition not suitable for its intended use.

(b) By notice in writing the Contracting Officer may decrease the property furnished or to be furnished by the Government under this contract. In any such case, the Contracting Officer upon the written request of the Contractor shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provisions affected by the decrease, in accordance with the procedures provided for in the clause of this contract entitled "Changes."

(c) Title to the Government-furnished Property shall remain in the Government. Title to Government-furnished Property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government-furnished Property, or any part thereof, be or become a fixture or lose its identity or personality by reason of affixation to any realty. The Contractor shall comply with the provisions of the "Manual for Control of Government Property in Possession of Contractors" (§ 30.2, Armed Services Procurement Regulation) as in effect on the date of the contract, which Manual is hereby incorporated by reference and made a part of this contract.

(d) The Government-furnished Property shall, unless otherwise provided herein, be used only for the performance of this contract.

(e) The Contractor shall maintain and administer, in accordance with sound industrial practice, a program for the maintenance, repair, protection and preservation of Government-furnished Property, until disposed of by the Contractor in accordance with this clause. In the event that any damage occurs to Government-furnished Property the risk of which has been assumed by the Government under this contract, the Government shall replace such items or the Contractor shall make such repair of the property as the Government directs; provided, however, that if the Contractor cannot effect such repair within the time required, the Contractor shall dispose of such property in the manner directed by the Contracting Officer. The contract price includes no compensation to the Contractor for the performance of any repair or replacement for which the Government is responsible, and an equitable adjustment will be made in the contract price for any such repair or replacement of Government-furnished Property made at the direction of the Government. Any repair or replacement for which the Contractor is responsible under the provisions of this contract shall be accomplished by the Contractor at its own expense.

The following provision (f) is for use in advertised fixed price contracts:

(f) Unless otherwise provided in this contract, the Contractor, upon delivery to him of any Government-furnished Property, assumes the risk of, and shall be responsible for, any loss thereof or damage thereto except for reasonable wear and tear, and except to the extent that such property is consumed in the performance of this contract.

The following provision (f) is for use in negotiated fixed-price contracts except those contracts involving Government-furnished Property relating to labor surplus area or small business partial set-asides for which the provision (f) for advertised contracts shall be used:

(f) (i) Except for loss, destruction or damage resulting from a failure of the Contractor due to willful misconduct or lack of good faith of any of the Contractor's managerial personnel as defined herein, to maintain and administer the program for the maintenance, repair, protection and preservation of the Government-furnished Property, as required by paragraph (e) hereof, and except as specifically provided in the clause or clauses of this contract designated in the Schedule, the Contractor shall not be liable for loss or destruction of or damage to the Government-furnished Property (A) caused by any peril while the property is in transit off the Contractor's premises, or (B) caused by any of the following perils while the property is on the Contractor's or subcontractor's premises, or on any other premises where such property may properly be located, or by removal therefrom because of any of the following perils:

(I) Fire; lighting; windstorm, cyclone, tornado, hail; explosion; riot, riot attending a strike, civil commotion; vandalism and malicious mischief; sabotage; aircraft or objects falling therefrom; vehicles running on land or tracks, excluding vehicles owned or operated by the Contractor or any agent or employee of the Contractor; smoke; sprinkler leakage; earthquake or volcanic eruption; flood, meaning thereby rising of a body of water; hostile or warlike action, including action in hindering, combating, or defending against an actual, impending or expected attack by any government or sovereign power (de jure or de facto), or by any authority using military, naval, or air forces, or by an agent of any such government, power, authority, or forces; or

(II) Other peril, of a type not listed above, if such other peril is customarily covered by insurance (or by a reserve for self-insurance) in accordance with the normal practice of the Contractor, or the prevailing practice in the industry in which the Contractor is engaged with respect to similar property in the same general locale.

The perils as set forth in (A) and (B) above are hereinafter called "excepted perils."

This clause shall not be construed as relieving a subcontractor from liability for loss or destruction of or damage to the Government-furnished Property while in its possession or control, except to the extent that the subcontract, with the prior approval of the Contracting Officer, may provide for the relief of the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government-furnished Property in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of the prime contract.

The term "Contractor's managerial personnel" as used herein means the Contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of (I) all or substantially all of the Contractor's business; (II) all or substantially all of the Contractor's operation at any one plant or separate location at which the contract is being performed; (III) a separate and complete major industrial operation in connection with the performance of this contract.

(ii) The Contractor represents that it is not including in the price hereunder, and agrees that it will not hereafter include in any price to the Government, any charge or reserve for insurance (including self-insurance funds or reserve) covering loss or destruction of or damage to the Government-furnished Property caused by any excepted peril.

(iii) Upon the happening of loss or destruction of or damage to any Government-furnished Property caused by an excepted peril, the Contractor shall notify the Contracting Officer thereof, and shall communicate with the Loss and Salvage Organization, if any, now or hereafter designated by the Contracting Officer, and with the assistance of the Loss and Salvage Organization so designated (unless the Contracting Officer has directed that no such organization be employed), shall take all reasonable steps to protect the Government-furnished Property from further damage, separate the damaged and undamaged Government-furnished Property, put all the Government-furnished Property in the best possible order, and furnish to the Contracting Officer a statement of: (A) the lost, destroyed and damaged Government-furnished Property (B) the time and origin of the loss, destruction or damage, (C) all known interests in commingled property of which the Government-furnished Property is a part, and (D) the insurance, if any, covering any part of or interest in such commingled property. The Contractor shall be reimbursed for the expenditures made by it in performing its obligations under this subparagraph (iii) (including charges made to the Contractor by the Loss and Salvage Organization, except any of such charges the payment of which the Government has, at its option, assumed directly), to the extent approved by the Contracting Officer and set forth in a Supplemental Agreement.

(iv) With the approval of the Contracting Officer after loss or destruction of or damage to Government-furnished Property, and subject to such conditions and limitations as may be imposed by the Contracting Officer, the Contractor may, in order to minimize the loss to the Government or in order to permit resumption of business or the like, sell for the account of the Government any item of Government-furnished Property which has been damaged beyond practicable repair, or which is so commingled or combined with property of others, including the Contractor, that separation is impracticable.

(v) Except to the extent of any loss or destruction of or damage to Govenment-furnished Property for which the Contractor is relieved of liability under the foregoing provisions of this clause, and except for reasonable wear and tear or depreciation, or the utilization of the Government-furnished Property in accordance with the provisions of this contract, the Government-furnished Property (other than property permitted to be sold) shall be returned to the Government in as good condition as when received by the Contractor in connection with this contract, or as repaired under paragraph (e) above.

(vi) In the event the Contractor is reimbursed or compensated for any loss or destruction of or damage to the Government-furnished Property, caused by an excepted peril, it shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any such loss, destruction or damage and, upon the request of the Contracting Officer, shall at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where a subcontractor has not been relieved from liability for any loss or destruction of or damage to the Gov-

ernment-furnished Property, the Contractor shall enforce the liability of the subcontractor for such loss or destruction of or damage to the Government-furnished Property for the benefit of the Government.

(vii) [Where applicable] In the event any aircraft are to be furnished under this contract, any loss or destruction of, or damage to, such aircraft or other Government-furnished Property occurring in connection with operations of said aircraft will be governed by the clause of this contract captioned "Flight Risks," to the extent such clause is, by its terms, applicable.

(g) The Government shall at all reasonable times have access to the premises wherein any Government-furnished Property is located.

(h) Upon the completion of this contract, or at such earlier dates as may be fixed by the Contracting Officer, the Contractor shall submit, in a form acceptable to the Contracting Officer, inventory schedules covering all items of Government-furnished Property not consumed in the performance of this contract (including any resulting scrap) or not theretofore delivered to the Government, and shall deliver or make such other disposal of such Government-furnished Property, as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the contract price or shall be paid in such other manner as the Contracting Officer may direct.

(i) Directions of the Contracting Officer and communications of the Contractor issued pursuant to this Clause shall be in writing.

§ 13.503 Government property clause for cost-reimbursement type contracts.

The following clause shall be used in cost-reimbursement type contracts for supplies and services (except contracts for experimental, developmental, or research work with educational or nonprofit institutions, where no profit to the contractor is contemplated) under which a Department is to furnish to the contractor, or the contractor is to acquire for the account of the Government, material, special tooling, or industrial facilities within the policy set forth in § 13.402 (a).

GOVERNMENT PROPERTY (MAY 1960)

(a) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-furnished Property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished Property suitable for use will be delivered to the Contractor at the times stated in the Schedule or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished Property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay occasioned the Contractor and shall equitably adjust the estimated cost, fixed fee, or delivery or performance dates, or all of them, and any other contractual provisions affected by such delay, in accordance with the procedures provided for in the clause of this contract entitled "Changes." In the event that Government-furnished Property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt thereof notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of the property or (ii) effect repairs or modifications. Upon completion of (i) or (ii) above, the Contracting Officer upon written request of the Contractor shall equitably adjust the estimated cost, fixed fee, or delivery or performance dates, or all of them, and any other contractual provision affected by the return or disposition, or the repair or modification, in accordance with the procedures provided for in the clause of this contract entitled "Changes." The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished Property or delivery of such property in a condition not suitable for its intended use.

(b) Title to all property furnished by the Government shall remain in the Government. Title to all property purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor. Title to other property, the cost of which is reimbursable to the Contractor under the contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, in whole or in the percentage prevailing by reason of the clause of the contract entitled "Allowable Cost, Fixed Fee and Payment," whichever first occurs. All Government-furnished Property, together with all property acquired by the Contractor, title to which vests in the Government under this paragraph, are subject to the provisions of this clause and are hereinafter collectively referred to as "Government Property."

(c) Title to the Government Property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government Property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty. The Contractor shall comply with the provisions of the "Manual for Control of Government Property in Possession of Contractors" (Part 30.2, Armed Services Procurement Regulation), as in effect on the date of the contract, which Manual is hereby incorporated by reference and made a part of this contract.

(d) The Government Property provided or furnished pursuant to the terms of this contract shall, unless otherwise provided herein, be used only for the performance of this contract.

(e) The Contractor shall maintain and administer in accordance with sound industrial practice, a program, for the maintenance, repair, protection and preservation of Government Property so as to assure its full availability and usefulness for the performance of this contract. The Contractor shall take all reasonable steps to comply with all appropriate directions or instructions which the Contracting Officer may prescribe as reasonably necessary for the protection of Government Property.

(f) (i) The Contractor shall not be liable for any loss of or damage to the Government Property, or for expenses incidental to such loss or damage, except that the Contractor shall be responsible for any such loss or damage (including expenses incidental thereto) (A) which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers, superintendents, or other equivalent representatives, who have supervision or direction of (I) all or substantially all of the Contractor's business, or (II) all or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed, or (III) a separate and complete major industrial operation in connection with the performance of this contract; or (B) which results from a failure on the part of the Contractor, due to the willful misconduct or lack of good faith on the part of any of its directors, officers, or other representatives mentioned in subparagraph (A) above, (I) to maintain and administer, in accordance with sound industrial practice, the program for maintenance, repair, protection and preservation of Government Property as required by paragraph (e) hereof, or (II) to take all reasonable steps to comply with any appropriate written directions of the Contracting Officer under paragraph (e) hereof; or (C) for which the Contractor is otherwise responsible under the express terms of the clause or clauses designated in the Schedule; or (D) which results from a risk expressly required to be insured under this contract, but only to the extent of the insurance so required to be procured and maintained, or to the extent of insurance actually procured and maintained, whichever is greater; or (E) which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement; provided that, if more than one of the above exceptions shall be applicable in any case, the Contractor's liability under any one exception shall not be limited by any other exception. This clause shall not be construed as relieving a subcontractor from liability for loss or destruction of or damage to Government Property in its possession or control, except to the extent that the subcontract, with the prior approval of the Contracting Officer, may provide for the relief of the subcontractor from such liability. In the absence of such approval, the subcontract shall contain appropriate provisions requiring the return of all Government Property in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of the prime contract.

(ii) The Contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance, or any provision for a reserve, covering the risk of loss of or damage to the Government Property, except to the extent that the Government may have required the Contractor to carry such insurance under any other provision of this contract.

(iii) Upon the happening of loss or destruction of or damage to the Government Property, the Contractor shall notify the Contracting Officer thereof, and shall communicate with the Loss and Salvage Organization, if any, now or hereafter designated by the Contracting Officer, and with the assistance of the Loss and Salvage Organization so designated (unless the Contracting Officer has designated that no such organization be employed), shall take all reasonable steps to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the Government property in the best possible order, and furnish to the Contracting Officer a statement of (A) the lost, destroyed and damaged Government Property, (B) the time and origin of the loss, destruction or damage, (C) all known interests in commingled property of which the Government Property is a part, and (D) the insurance, if any, covering any part of or interest in such commingled property. The Contractor shall

make repairs and renovations of the damaged Government Property or take such other action, as the Contracting Officer directs.

(iv) In the event the Contractor is indemnified, reimbursed, or otherwise compensated for any loss or destruction of or damage to the Government Property, it shall use the proceeds to repair, renovate or replace the Government Property involved, or shall credit such proceeds against the cost of the work covered by the contract, or shall otherwise reimburse the Government, as directed by the Contracting Officer. The Contractor shall do nothing to prejudice the Government's right to recover against third parties for any such loss, destruction or damage and, upon the request of the Contracting Officer, shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery. In addition, where the subcontractor has not been relieved from liability for any loss or destruction of or damage to Government Property, the Contractor shall enforce the liability of the subcontractor for such loss or destruction of or damage to the Government Property for the benefit of the Government.

(v) If this contract is for the development, production, modification, maintenance, or overhaul of aircraft, or otherwise involves the furnishing of aircraft by the Government, the clause of this contract entitled "Flight Risks" shall control, to the extent it is applicable, in the case of loss or destruction of, or damage to, aircraft.[1]

(g) The Government shall at all reasonable times have access to the premises where any of the Government Property is located.

(h) The Government Property shall remain in the possession of the Contractor for such period of time as is required for the performance of this contract unless the Contracting Officer determines that the interests of the Government require removal of such property. In such case the Contractor shall promptly take such action as the Contracting Officer may direct with respect to the removal and shipping of Government Property. In any such instance, the contract may be amended to accomplish an equitable adjustment in the terms and provisions thereof.

(i) Upon the completion of this contract, or at such earlier dates as may be fixed by the Contracting Officer, the Contractor shall submit to the Contracting Officer in a form acceptable to him, inventory schedules covering all items of the Government Property not consumed in the performance of this contract, or not theretofore delivered to the Government, and shall deliver or make such other disposal of such Government Property as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the cost of the work covered by the contract or shall be paid in such manner as the Contracting Officer may direct. The foregoing provisions shall apply to scrap from Government Property provided, however, that the Contracting Officer may authorize or direct the Contractor to omit from such inventory schedules any scrap consisting of cutting and processing waste, such as chips, cuttings, borings, turnings, short ends, circles, trimmings, clippings, and remnants, and to dispose of such scrap in accordance with the Contractor's normal practice and account therefor as a part of general overhead or other reimbursable cost in accordance with the Contractor's established accounting procedures.

(j) Unless otherwise provided herein, the Government shall not be under any duty or obligation to restore or rehabilitate, or to pay the costs of the restoration or rehabilitation of the Contractor's plant or any portion thereof which is affected by the removal of any Government Property.

(k) Directions of the Contracting Officer and communications of the Contractor issued pursuant to this clause shall be in writing.

NOTE: As provided in paragraph (i) of the above clause, the contracting officer may, subject to Departmental procedures, authorize or approve use of the contractor's established scrap disposal and accounting procedures whenever the amount and recoverable value of scrap from the Government property are relatively minor and the contractor's established procedures for accumulating and disposing of scrap and crediting the proceeds thereof to general overhead or other general cost will permit the Government to share equitably in such scrap recovery through a reduction of overhead or other cost factor affecting reimbursement under the contract.

§ 13.504 Special tooling clause for fixed-price contracts.

The following clause shall be used in fixed-price contracts for supplies or services (except contracts for experimental, developmental, or research work) for the performance of which the contractor furnishes special tooling, under the conditions set forth in § 13.302 (b), but is not for use in contracts in which special tooling is called for as a separate item in the Schedule (see § 13.302(a)).

SPECIAL TOOLING (SEPT. 1958)

(a) The term "special tooling", as used in this clause, means all jigs, dies, fixtures, molds, patterns, special taps, special gauges, special test equipment, other special equipment and manufacturing aids, and replacements thereof, acquired or manufactured by the Contractor for use in the performance of this contract, which are of such a specialized nature that, without substantial modification or alteration, their use is limited to the production of such supplies or parts thereof, or the performance of such services, as are peculiar to the needs of the Government. The term does not include: (i) Items of tooling or equipment heretofore acquired by the Contractor, or replacements thereof, whether or not altered or adapted for use in the performance of this contract, (ii) consumable small tools, or (iii) general or special machine tools, or similar capital items.

(b) The Contractor agrees not to use any items of special tooling except in the performance of this contract, or except as otherwise provided by this clause, without prior written approval of the Contracting Officer. The Contractor may, with the approval of the Contracting Officer, use the special tooling in the performance of other contracts with the Government, or subcontracts under Government contracts, provided that the Contractor agrees not to include in the price or prices for any such contracts or subcontracts, involving the use of such special tooling, the cost of such tooling or any allowance or charge to cover depreciation or amortization which has previously been charged against this contract.

(c) As and when any substantial portion of usable special tooling is no longer needed by the Contractor for the performance of this contract, and of other Government contracts and subcontracts as to which approval has been obtained under paragraph (b) above, the Contractor shall promptly notify the Contracting Officer thereof, and shall furnish to the Contracting Officer a list of the products, parts or services for the manufacture or performance of which such special tooling was used or designed. Upon completion or termination of all work under this contract, or of this contract and other Government contracts and subcontracts as to which approval has been obtained under paragraph (b) above, the Contractor shall furnish a final list in the same form covering all items not previously reported under this paragraph. Special tooling which has become obsolete as a result of changes in design or specification need not be reported, except as provided for in paragraph (d).

(d) In the event of any changes in design or specifications which affect interchangeability of parts, the Contractor shall, unless otherwise agreed to by the Contracting Officer, give the Contracting Officer notice of any part which is not interchangeable with the new or superseding part and the usable special tooling for each part covered in such notice shall be retained by the Contractor subject to the provisions of paragraph (i), pending disposition under paragraph (f).

(e) At the time it furnishes any list or notice under (c) or (d) above, the Contractor may designate those items of special tooling (either specifically or by listing the particular products, parts, or services for which such items were used or designed) which it desires to retain, together with a written offer: (i) to retain any or all of such items, free and clear of any Government interest, for an amount designated therein, which should ordinarily not be less than the then fair value of such items (which fair value takes into account, among other things, the value of such items to the Contractor for use in further work by it); or (ii) to retain any or all such items for such period of time and subject to such terms and conditions as may be agreed to by the parties hereto, subject to ultimate retention or disposition of such items in accordance with paragraph (f) hereof.

(f) Within 90 days after receipt of any list or notice under paragraph (c) or (d) hereof, or such further period as may be agreed upon by the parties, the Contracting Officer shall furnish to the Contractor: (i) a list specifying the particular products, parts, or services for which the Government may require special tooling, together with a request that the Contractor transfer title (to the extent not previously transferred under any other clause of this contract) and deliver to the Government all usable items of special tooling which were used or designed for the manufacture or performance of any designated portion of such products, parts, or services, and which were on hand when production of such products or parts, or performance of such services, ceased; or (ii) an acceptance or rejection of any offer made by the Contractor under paragraph (e) above, or a request for further negotiation with respect thereto; or (iii) subject to the provisions of paragraph (j) hereof, a direction to the Contractor to sell, or to dispose of as scrap, for the account of the Government, any or all of the special tooling covered by such list; or (iv) a statement with respect to any or all of the special tooling covered by such list that the Government has no further interest therein and waives its rights therein; or (v) any combination of the foregoing, as the circumstances warrant. The Contractor shall promptly comply with any request by the Contracting Officer under this paragraph to transfer title to any items of special tooling, and shall, subject to the provisions of paragraph (j) hereof, (1) immediately prepare such items for shipment by proper packaging, packing, and marking, in accordance with any instructions which may be issued by the Contracting Officer, and shall promptly deliver such items to the Government, as directed by the Contracting Officer, or (2) if a storage agreement has been entered into, prepare such items for storage in accordance therewith, as directed by the Contracting Officer. Any items of special tooling so delivered or stored shall be accompanied by such operation sheets or other appropriate data as are necessary to show the manufacturing opera-

[1] This subparagraph may be omitted where it is clearly inapplicable.

tions or processes for which such items were used or designed. If the Contracting Officer has requested further negotiations under (ii) of this paragraph, the Contractor agrees that it will enter into such negotiations in good faith with the Contracting Officer. Any items of special tooling which are not disposed of by transfer of title and delivery to the Government, or by acceptance of an offer of the Contractor made under paragraph (e), or of such offer as modified in the course of negotiations, shall be disposed of in the manner set forth in (iii) or (iv) of this paragraph.

(g) If the Contracting Officer accepts an offer of the Contractor to retain any items of special tooling, or if any such items are sold to third parties or disposed of as scrap, the net proceeds shall: (i) be deducted from the amounts due to the Contractor under this contract and the contract amended accordingly; or (ii) be otherwise paid as the Contracting Officer may direct.

(h) The Contractor agrees that it will follow its normal industrial practice in maintaining property control records on all the special tooling, and that it will make such records available for inspection by the Government at all reasonable times. The Contractor further agrees that, to the extent practicable, it will identify by appropriate stamp, tag or other mark all special tooling subject to this clause.

(i) The Contractor agrees that between the date any usable items of special tooling are no longer needed by it, within the meaning of this clause, and the date of final disposition of such items under this clause, it will take all reasonable steps necessary to maintain the identity and existing conditions of such items, unless the Contracting Officer has directed that such items be disposed of as scrap or has given notice under (f) (iii). The Contractor shall not be required to keep any such items in place.

(j) Any preparation of items for shipment required of the Contractor under paragraph (f) of this clause, or any disposal as scrap under paragraph (f) (iii), or any action required of the Contractor under paragraph (i), shall be taken pursuant to written instructions of the Contracting Officer, which shall (i) provide for an equitable adjustment of the contract price to cover any additional cost, to the Contractor, not taken into account in the negotiation of this contract, of complying with such instructions, which adjustment shall be made in accordance with the procedure set forth in the clause of this contract entitled "Changes," or (ii) otherwise provide for payment to the Contractor of any such additional cost. Any failure of the Contracting Officer to issue the Contractor specific disposition instructions shall be construed as an instruction to the Contractor to take the action required under paragraph (i) with provision for equitable adjustment or payment as provided for above.

The following paragraph relating to subcontracts shall be used in cases where the Contracting Officer deems the use of such paragraph to be necessary in order to protect the Government's interest in special tooling which may be acquired under such subcontracts:

(k) The Contractor agrees that, in placing any subcontracts or purchase orders under this contract which involve the use of special tooling, the full cost of which is charged to such subcontract or purchase order, it will include therein appropriate provisions to obtain rights comparable to those granted to the Government by this clause, and agrees that it will exercise such rights for the benefit of the Government, as the Contracting Officer may direct.

In appropriate cases, the following alternative clause, relating to subcontracts may be used:

(k) The Contractor agrees that, in placing any subcontracts or purchase orders under this contract which involve the use of special tooling, the full cost of which is charged to such subcontract or purchase order, it will to the extent consistent with its normal business practice include appropriate provisions therein to obtain rights comparable to those granted to the Government by this clause, and agrees that it will exercise such rights for the benefit of the Government, as the Contracting Officer may direct.

§ 13.505 Government-furnished property clause for fixed-price type contracts with non-profit institutions.

The following clause shall be used in fixed-price research and development contracts with non-profit institutions (provided such contracts are executed on a non-profit basis) under which a Department is to furnish property to the contractor:

GOVERNMENT-FURNISHED PROPERTY (OCT. 1959)

(a) The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-furnished Property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished Property suitable for use will be delivered to the Contractor at the times stated in the Schedule, or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished Property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay occasioned the Contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by the delay. In the event that Government-furnished Property is received by the Contractor in a condition not suitable for its intended use, the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of such property, or (ii) effect repairs or modifications. Upon completion of (i) or (ii) above, the Contracting Officer upon timely written request of the Contractor shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision effected by the return, disposition, repair or modification. The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished Property or delivery of such property in a condition not suitable for its intended use.

(b) By notice in writing the Contracting Officer may decrease the property furnished or to be furnished by the Government under this contract. In any such case, the Contracting Officer upon timely written request of the Contractor shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provisions affected by the decrease.

(c) Title to the Government-furnished property shall remain in the Government. Title to Government-furnished property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government-furnished property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.

In accordance with § 13.802, the following alternative paragraph (c) may be used in contracts for basic or applied research:

(c) Title to Government-furnished property shall remain in the Government, except for that equipment the title to which is transferred to the Contractor pursuant to this paragraph. The Contracting Officer may at any time during the term of this contract, or upon completion or termination, transfer title to equipment to the Contractor upon such terms and conditions as may be agreed upon: *Provided*, That, the Contractor shall not under any Government contract, or subcontract thereunder, charge for any depreciation, amortization, or use of such equipment as is donated under this paragraph. Upon the transfer of title to equipment under this paragraph, such equipment shall cease to be Government-furnished property. Title to Government-furnished property, not otherwise transferred to the Contractor, shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government-furnished property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.

(d) The Government-furnished Property shall, unless otherwise provided herein, and except as may be otherwise approved by the Contracting Officer, be used only for the performance of this contract.

(e) The Contractor shall maintain and administer, in accordance with sound business practice, a program for the maintenance, repair, protection and preservation of Government-furnished Property, until disposed of by the Contractor in accordance with this clause. In the event that any damage occurs to Government-furnished Property the risk of which has been assumed by the Government under this contract, the Government shall replace such items or the Contractor shall make such repair of the property as the Government directs; provided, however, that if the Contractor cannot effect such repair within the time required, the Contractor may reject such property. The contract price includes no compensation to the Contractor for the performance of any repair or replacement for which the Government is responsible, and an equitable adjustment will be made in the contract price for any such repair or replacement of Government-furnished Property made at the direction of the Government. Any repair or replacement for which the Contractor is responsible under the provisions of this contract shall be accomplished by the Contractor at its own expense.

(f) The provisions of Part III, Appendix C, Armed Services Procurement Regulation, Manual for Control of Government Property in possession of Non-Profit Research and Development Contractors, as in effect on the date of this contract are hereby incorporated by reference and made a part of the contract, insofar as they relate to Government-furnished Property. The Contractor agrees to comply with the provisions thereof relating to the keeping of property control records, identification and marking, segregation and commingling, taking of inventories, and control of salvage and scrap, and the Contractor also accepts the responsibilities set forth in said Part III with respect to Government-furnished Property.

(g) The Contractor agrees to make available to authorized representatives of the Contracting Officer at all reasonable times at the office of the Contractor all of its property records under this contract, and access to any premises where any of the Government-furnished Property is located.

(h) (i) The Contractor shall not be liable for any loss of or damage to the Government-furnished Property, or for expenses incidental to such loss or damage except that the Contractor shall be liable for any such loss or damage (including expenses incidental thereto):

(A) Which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers, superintendents, or other equivalent representatives who have supervision or direction of all or substantially all of the Contractor's business, or all or substantially all of the Contractor's operations at any one plant, laboratory, or separate location in which this contract is being performed; or

(B) Which results from a failure on the part of the Contractor, due to the willful misconduct or lack of good faith on the part of any of its directors, officers, or other representatives mentioned in subparagraph (A) above, to maintain and administer, in accordance with sound business practice, the program for maintenance, repair, protection and preservation of Government-furnished Property as required by subparagraph (e) above; or

(C) For which the Contractor is otherwise responsible under the express terms of the clause or clauses designated in the Schedule; or

(D) Which results from a risk expressly required to be insured under some other provision of this contract, or of the schedules or task orders thereunder, but only to the extent of the insurance so required to be procured and maintained or to the extent of insurance actually procured and maintained, whichever is greater; or

(E) Which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement;

Provided, That, if more than one of the above exceptions shall be applicable in any case, the Contractor's liability under any one exception shall not be limited by any other exception.

(ii) The Contractor represents that it is not including in the price hereunder, and agrees that it will not hereafter include in any price to the Government, any charge or reserve for insurance (including self-insurance funds or reserves) covering loss or destruction of or damage to the Government-furnished Property, except to the extent that the risk of loss is imposed on the Contractor under (i) (C) above, or insurance has been required under (i) (D) above.

(iii) Upon the happening of loss or destruction of or damage to any Government-furnished Property, the Contractor shall notify the Contracting Officer thereof and shall communicate with the Loss and Salvage Organization, if any, now or hereafter designated by the Contracting Officer, and with the assistance of the Loss and Salvage Organization so designated (unless the Contracting Officer has directed that no such organization be employed) shall take all reasonable steps to protect the Government-furnished Property from further damage, separate the damaged and undamaged Government-furnished Property, put all the Government-furnished Property in the best possible order, and furnish to the Contracting Officer a statement of:

(A) The lost, destroyed and damaged Government-furnished Property;

(B) The time and origin of the loss, destruction or damage;

(C) All known interests in commingled property of which the Government-furnished Property is a part; and

(D) The insurance, if any, covering any part of or interest in such commingled property.

The Contractor shall be reimbursed for the expenditures made by it in performing its obligations under this subparagraph (iii) (including charges made to the Contractor by the Loss and Salvage Organization, except any of such charges the payment of which the Government has, at its option, assumed directly), to the extent approved by the Contracting Officer and set forth in a Supplemental Agreement or amendment to this contract.

(iv) With the approval of the Contracting Officer after loss or destruction of or damage to Government-furnished Property, and subject to such conditions and limitations as may be imposed by the Contracting Officer, the Contractor may, in order to minimize the loss to the Government or in order to permit resumption of business or the like, sell for the account of the Government any item of Government-furnished Property which has been damaged beyond practicable repair, or which is so commingled or combined with property of others, including the Contractor, that separation is impracticable.

(v) Except to the extent of any loss or destruction of or damage to Government-furnished Property for which the Contractor is relieved of liability under the foregoing provisions of this clause, and except for reasonable wear and tear or depreciation, or the utilization of the Government-furnished Property in accordance with the provisions of this Contract, the Government-furnished Property (other than property permitted to be sold) shall be returned to the Government in as good condition as when received by the Contractor in connection with this contract, or as repaired under paragraph (e) above.

(vi) In the event the Contractor is reimbursed or compensated for any loss or destruction of or damage to the Government-furnished Property, it shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any such loss, destruction or damage and, upon the request of the Contracting Officer, shall at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including assistance in the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery.

(vii) (Where applicable). In the event any aircraft are to be furnished under this contract, any loss or destruction of, or damage to, such aircraft or other Government-furnished Property occurring in connection with operations of said aircraft will be governed by the clause of this contract captioned "Flight Risks," to the extent such clause is, by its terms applicable.

(i) Upon completion or expiration of this contract, any Government property which has not been consumed in the performance of this contract, or which has not been disposed of as hereinafter provided in subparagraph (i) of this article, or for which the Contractor has not otherwise been relieved of responsibility, shall be disposed of in the same manner, and subject to the same procedures, as is provided in subparagraph (g) of the clause of this contract entitled "Termination for the Convenience of the Government" with respect to termination inventory. The proceeds of any such disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract, or shall otherwise be credited to the price or costs of the work covered by this contract, or shall be paid in such other manner as the Contracting Officer may direct. Pending final disposition of such property, the Contractor agrees to take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation thereof.

(j) If the Contracting Officer determines that the interests of the Government require removal of any Government-furnished Property, or if the Contractor determines any Government-furnished Property to be in excess of its needs under this contract, such Government-furnished Property shall be disposed of in the same manner as covered by paragraph (i) above. In the event that the Contracting Officer requires the removal of any Government-furnished Property under this subparagraph (j) or subparagraph (i) above, upon timely written request of the Contractor, an equitable adjustment shall be made in the contract price to cover the direct cost to the Contractor of such removal and of any property damage occasioned thereby.

§ 13.506 Government property clauses for cost-reimbursement type research and development contracts with non-profit institutions.

The following clause shall be used in cost-reimbursement type research and development contracts with non-profit institutions (provided such contracts are executed on a no-fee basis) under which a Department is to furnish Government property to the contractor, or the contractor is to acquire property for the account of the Government:

GOVERNMENT PROPERTY (OCT. 1959)

(a) The Government shall deliver to the Contractor, for use, in connection with and under the terms of this contract, the property described in this contract, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-furnished Property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished Property suitable for use will be delivered to the Contractor at the times stated in the Schedule of this contract or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished Property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay occasioned the Contractor and shall equitably adjust the estimated cost, or delivery or performance dates, or both, and any other contractual provisions affected by such delay. In the event that the Government-furnished Property is received by the Contractor in a condition not suitable for the intended use, the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of such property, or (ii) effect repairs or modifications. Upon completion of (i) or (ii) above, the Contracting Officer upon timely written request of the Contractor shall equitably adjust the estimated cost, or delivery or performance dates, or both, and any other contractual provision affected by the return, disposition, repair or modification. The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished Property or delivery of such property in a condition not suitable for its intended use.

(b) The Government may deliver to the Contractor Government-furnished Property in addition to that set forth in this contract. Upon such delivery this contract may be amended, if appropriate, to accomplish an equitable adjustment in its terms and provisions.

(c) Title to all property furnished by the Government shall remain in the Government.

Title to all property purchased by the Contractor, for the cost of which the Contractor is to be reimbursed as a direct item of cost under this contract, shall pass to and vest in the Government upon delivery of such property by the vendor. Title to other property, the cost of which is to be reimbursed to the Contractor under this contract, shall pass to and vest in the Government upon (i) issuance for use of such property in the performance of this contract, or (ii) commencement of processing or use of such property in the performance of this contract, or (iii) reimbursement of the cost thereof by the Government, whichever first occurs. All Government-furnished property, together with all property acquired by the Contractor, title to which vests in the Government under this paragraph, are subject to the provisions of this clause and are hereinafter collectively referred to as "Government property."

In accordance with § 13.802, the following additional language may be added to paragraph (c) in contracts for basic or applied research :

Notwithstanding the provisions of this paragraph (c) relative to title, the Contracting Officer may at any time during the term of this contract, or upon completion or termination, transfer title to equipment to the Contractor upon such terms and conditions as may be agreed upon: *Provided*, That the Contractor shall not under any Government contract, or subcontract thereunder, charge for any depreciation, amortization or use of such equipment as is donated under this paragraph. Upon the transfer of title to equipment under this paragraph, such equipment shall cease to be Government property.

(d) Title to the Government Property shall not be affected by the incorporation or attachment thereof to any property not owned by the Government, nor shall such Government Property, or any part thereof, be or become a fixture or lose its identity as personalty by reason of affixation to any realty.

(e) The Government Property provided or furnished pursuant to the terms of this contract shall, unless otherwise provided herein and except as may be otherwise approved by the Contracting Officer, be used only for the performance of this contract.

(f) The Contractor shall maintain and administer in accordance with sound business practice a program for the maintenance, repair, protection and preservation of Government Property so as to assure its full availability and usefulness for the performance of this contract. The Contractor shall take all reasonable steps to comply with all appropriate directions or instructions which the Contracting Officer may prescribe as reasonably necessary for the protection of the Government Property.

(g) The provisions of Part III, Appendix C, Armed Services Procurement Regulation, Manual for Control of Government Property in Possession of Non-Profit Research and Development Contractors, as in effect on the date of this contract, are herein incorporated by reference and made a part of this contract. The Contractor agrees to comply with the provisions thereof relating to the keeping of property control records, identification and marking, segregation and commingling, taking of inventories, and control of salvage and scrap, and the Contractor also accepts the responsibilities set forth in said Part III with respect to Government Property.

(h) The Contractor agrees to make available to authorized representatives of the Contracting Officer at all reasonable times at the office of the Contractor all of its property records under this contract, and access to any premises where any of the Government Property is located.

(i) (1) The Contractor shall not be liable for any loss of or damage to the Government Property, or for expenses incidental to such loss or damage, except that the Contractor shall be responsible for any such loss or damage (including expenses incidental thereto):

(i) Which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, or on the part of any of its managers, superintendents, or other equivalent representatives, who has supervision or direction of all or substantially all of the Contractor's business, or all or substantially all of the Contractor's operations at any one plant, laboratory, or separate location in which this contract is being performed;

(ii) Which results from a failure on the part of the Contractor, due to the willful misconduct or lack of good faith on the part of any of its directors, officers, or other representatives mentioned in (i) above, (A) to maintain and administer, in accordance with sound business practice, the program for maintenance, repair, protection and preservation of Government Property as required by (f) above, or (B) to take all reasonable steps to comply with any appropriate written directions of the Contracting Officer under (f) above;

(iii) For which the Contractor is otherwise responsible under the express terms of the clause or clauses designated in the schedule;

(iv) Which results from a risk expressly required to be insured under some other provision of this contract, but only to the extent of the insurance so required to be procured and maintained, or to the extent of insurance actually procured and maintained, whichever is greater; or

(v) Which results from a risk which is in fact covered by insurance or for which the Contractor is otherwise reimbursed, but only to the extent of such insurance or reimbursement: *Provided*, That, if more than one of the above exceptions shall be applicable in any case, the Contractor's liability under any one exception shall not be limited by any other exception.

(2) The Contractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance, or any provision for a reserve, covering the risk of loss of or damage to the Government Property, except to the extent that the Government may have required the Contractor to carry such insurance under any other provision of this contract.

(3) Upon the happening of loss or destruction of or damage to the Government Property, the Contractor shall notify the Contracting Officer thereof, and shall communicate with the Loss and Salvage Organization, if any, now or hereafter designated by the Contracting Officer, and with the assistance of the Loss and Salvage Organization so designated (unless the Contracting Officer has designated that no such organization be employed), shall take all reasonable steps to protect the Government Property from further damage, separate the damaged and undamaged Government Property, put all the Government Property in the best possible order, and furnish to the Contracting Officer a statement of:

(i) The lost, destroyed and damaged Government Property;

(ii) The time and origin of the loss, destruction or damage;

(iii) All known interests in commingled property of which the Government Property is a part; and

(iv) The insurance, if any, covering any part of or interest in such commingled property.

The Contractor shall make repairs and renovations of the damaged Government Property or take such other action as the Contracting Officer directs.

(4) In the event the Contractor is indemnified, reimbursed, or otherwise compensated for any loss or destruction of or damage to the Government property, it shall use the proceeds to repair, renovate or replace the Government property involved, or shall credit such proceeds against the cost of the work covered by the contract, or shall otherwise reimburse the Government, as directed by the Contracting Officer. The Contractor shall do nothing to prejudice the Government's right to recover against third parties for any such loss, destruction or damage and, upon the request of the Contracting Officer, shall, at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including assistance in the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery.

(5) (Where applicable.) In the event any aircraft are to be furnished under this contract, any loss or destruction of, or damage to, such aircraft or other Government Property occurring in connection with operations of said aircraft will be governed by the clause of this contract captioned "Flight Risks," to the extent such clause is, by its terms, applicable.

(j) The Government Property shall remain in the possession of the Contractor for such period of time as is required for the performance of this contract unless the Contracting Officer determines that the interests of the Government require removal of such property. In such case the Contractor shall promptly take such action as the Contracting Officer may direct with respect to the removal and shipping of Government Property. In any such instance, this contract may be amended to accomplish an equitable adjustment in its terms and provisions.

(k) Upon completion or expiration of this contract, any Government Property which has not been consumed in the performance of this contract, or which has not been disposed of as hereinafter provided in subparagraph (l) of this clause, or for which the Contractor has not otherwise been relieved of responsibility, shall be disposed of in the same manner, and subject to the same procedures, as is provided in subparagraph (g) of the clause of this contract entitled "Termination for the Convenience of the Government" with respect to termination inventory. The proceeds of any such disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract, or shall otherwise be credited to the cost of the work covered by this contract, or shall be paid in such other manner as the Contracting Officer may direct. Pending final disposition of such property, the Contractor agrees to take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation thereof.

(l) If the Contracting Officer determines that the interests of the Government require removal of any Government Property, or if the Contractor determines any Government Property to be in excess of its needs under this contract, such Government Property shall be disposed of in the same manner as provided by subparagraph (k) above. In the event that the Contracting Officer requires the removal of any Government Property under this subparagraph (l) or subparagraph (k) above, the direct cost to the Contractor of such removal and of any property damage occasioned thereby shall constitute an allowable cost thereunder.

(m) Unless otherwise provided herein, the Government shall not be under any duty or obligation to restore or rehabilitate, or to pay the costs of the restoration or rehabilitation of the Contractor's plant or any portion thereof which is affected by the removal of any Government Property.

(n) Directions of the Contracting Officer and communications of the Contractor issued pursuant to this clause shall be in writing.

Subpart F—Use of Government Owned Industrial Facilities on Work Other Than for a Military Department

§ 13.600 Scope of subpart.

The preceding subparts of this part are intended to be applicable only to those situations in which Government property is provided to contractors or subcontractors of any tier, for use in connection with procurement by the military departments. This subpart relates to making available to contractors, former contractors, or other parties, Government-owned industrial facilities under the control of a military department for use solely or principally on work other than for a military department. (As to making industrial facilities available principally for use in connection with procurement by the military departments, and incidentally for use on work other than for a military department, see § 13.407.) The question of making industrial facilities available for use on work other than for a military department may arise with respect to such property in the possession of the Government (e.g., machine tools in reserve storage) or in the possession of the potential user (e.g., where a contractor has completed the contract under which the property was originally provided). Basic authority to permit the use of Government property on work other than for a military department is found in statutes authorizing the Secretaries to lease property under their control (see 10 U.S.C. 2667 and 50 U.S.C. App. 1173).

§ 13.601 Rental.

§ 13.601–1 General.

Whenever industrial facilities are made available for use on work other than for an agency of the Department of Defense, the user shall be charged a fair and reasonable rental: *Provided*, That under Departmental procedures consistent with § 13.407 (a) rental may be waived with regard to such property furnished solely for use in performing work for Government agencies. Such rental, unless otherwise specified herein, shall be established on the basis of sound commercial practice, including any prevailing commercial rates. Except as otherwise provided in § 13.601–2, such rental may, where permitted by the law under which the contract or agreement is executed, take into consideration obligations assumed by the user to protect and maintain the property as well as to perform other services as all or part of the consideration for the contract or agreement. The rental shall, in any event, be such as to prevent the user from obtaining an unfair competitive advantage by reason thereof over competitors who own their facilities or obtain them from private sources. The rental shall be charged on the basis of the time during which the property is available for use rather than on the basis of the time during which the property is actually used, except in the case of facilities, other than those covered by § 13.601–2, where it is determined by the Secretary concerned, or his representative duly authorized to approve the contract or agreement by which the property is made available, to be impracticable or contrary to the best interest of the Government. The Government shall make no warranty, express or implied, regarding the conditions or fitness for use of any item of property.

§ 13.601–2 Rental rates.

Except as provided in § 13.601–3, rental charged for industrial facilities shall conform to the following rates.

(a) As to production equipment of the types listed in § 13.603, rent shall be at the appropriate rate set forth below regardless of the extent and value of any obligations undertaken by the user to provide maintenance or other services.

Age of equipment	*Monthly rental rate*
0 to 2 years	1¾ % of acquisition cost.
Over 2 to 6 years	1½ % of acquisition cost.
Over 6 to 10 years	1 % of acquisition cost.
Over 10 years	¾ % of acquisition cost.

The acquisition cost to be used in determining rental shall be the purchase price of the equipment charged the Government plus costs of transportation to, and installation in, the place where the equipment will be used under the contract or agreement, if such costs are borne by the Government. Transportation and installation costs may be estimated by the contracting officer where the actual costs are not known. When special tooling or accessories are rented with the equipment, equipment acquisition cost shall be increased to include the price charged the Government for such tooling or accessories. When equipment is modernized by substantial rebuilding at Government expense so as to enhance the original capability of the tool, the acquisition cost of the equipment shall be adjusted upward properly to take account of the increased value that such rebuilding and modernization represents. If the purchase price is not available or cannot be obtained from the manufacturer of the equipment, the Department concerned shall obtain an estimated purchase price from the Office of the Assistant Secretary of Defense (Supply and Logistics). On January 1 following the date of manufacture of each item of equipment, such item shall be considered one year old, and on each succeeding January 1 it shall become one year older; and contracts or agreements shall so provide. For example, if an item of equipment is manufactured on July 15, 1958, it will be considered to be one year old on January 1, 1959, two years old on January 1, 1960, three years old on January 1, 1961, etc. The item of equipment will be considered "over two years" old on and after January 1, 1960, "over six years" old on and after January 1, 1964, and "over ten years" old on and after January 1, 1968.

(b) As to personal property and equipment constituting industrial facilities other than production equipment covered in paragraph (a) of this section, and with respect to which there are not prevailing commercial rates, a rent at the rate of not less than 1 percent per month of the original acquisition cost of such property or equipment shall be charged.

(c) Charges to be made under the provisions of paragraphs (a) and (b) of this section shall conform to the following. For any period in which use of personal property and equipment constituting industrial facilities is authorized, the contractor, regardless of the character and extent of his use of the facilities, shall be charged a full month's rental for each month or fraction thereof, computed in accordance with the above rates, reduced by the amount of rental which would be properly allocable to Government contracts and subcontracts on which use of the facilities without charge has been authorized. The portion of the rental charge properly allocable to such Government contracts and subcontracts may be determined either prospectively or retroactively, as provided in the facilities contract, and shall be computed by multiplying the full rental for the period by a fraction whose numerator is the amount of use of the facilities by the contractor on a no charge basis and whose denominator is the total amount of use of the facilities both on a rental and no charge basis. For purposes of the above formula, amounts of use may be determined on the basis of direct labor hours, sales, hours of use, or any other method which the contracting officer determines will result in an equitable apportionment of the rental charge.

(d) As to real property constituting industrial facilities a fair and reasonable rent shall be charged.

Except to the extent otherwise permitted by Departmental procedures in the case of property covered by paragraph (b) of this section, the contract or agreement under which property covered by this section is made available shall require the user to protect, preserve, maintain, and repair the property in accordance with sound industrial practice without cost to the Government under such contract or agreement.

§ 13.601–3 Exceptions.

The requirements of § 13.601–2 shall not be applicable:

(a) In the case of industrial facilities involved in leases of wholly-owned Government facilities operated by private contractors on a fee basis;

(b) To non-defense leases of complete industrial facilities (including land, buildings, and equipment) which have been approved by the Congressional Committees on Armed Services in accordance with 10 U. S. C. 2662 where the total acquisition costs of the included production equipment of the classes listed in § 13.603 is less than 10 percent of acquisition costs of the entire facility. In each such instance, however, a report giving pertinent details shall be submitted to the Assistant Secretary of Defense (Supply and Logistics). It will include the names of the facility and the lessor, the total amount of rental or other fees paid to the Government, the planned use of the facility, a list of the production equipment (of the types covered by § 13.603) including the date of manufacture and acquisition cost of each item, the period of non-defense use, and

such other data as is considered significant.

(c) To items of production equipment which are such that the size, complexity, or performance characteristics present unusual problems reflected in the time required in connection with preparing for shipment, shipping from storage or supply point, installing, and making ready for operation: *Provided,* The Office of Defense and Civilian Mobilization has approved the over-all program involving such equipment.

(d) To personal property and equipment which is a part of industrial facilities left in place or installed in a contractor's plant for mobilization, emergency, or future production purposes of the Government: *Provided,* That the requirements of § 13.601–2 shall apply to so much of such personal property of equipment, or of its capacity, as is used or authorized for use at any one time.

(e) As otherwise excepted by the Office of Defense and Civilian Mobilization.

§ 13.602 Term of use.

(a) Leases of industrial facilities shall be for a specific term which shall not exceed the period of time expected to be required to fulfill the purpose for which the facilities are made available.

(b) With respect to equipment leases, the lessee shall not be granted, by an option or otherwise, the unilateral right to extend the period of use.

§ 13.603 Production equipment.

The production equipment to which the provisions of § 13.601–2 shall be applicable are:

Production equipment code No.	*Description*
3411–341999	Machine tools.
3441–34490	Secondary metal forming and cutting machines.
34510–34519	Electric arc welding machines.
34520–3452129 345220–34529	Electric resistance welding machines.
345330–345339	Gas (flame) cutting machines—excluding hand torches.
357211–357219	Metal heat treating furnaces—Box type.
357221–3572249	Metal heat treating furnaces—Bath type.
357231–357239	Metal heat treating furnaces—Basket type.
357241–3572439	Metal heat treating furnaces—Bell type.
357261–357269	Metal heat treating furnaces—Pit type.
357271–357279	Metal heat treating furnaces—Pot type.
3572841–3572849	Induction heating devices.
54160000	Transformers, power, uninstalled, 501 kva and above, 50 and 60 cycle only.
5561–556159	Powered trucks, industrial.
5563–5563994	Tractors, industrial.
5564–556420162	Trailers for industrial tractors.
563908	Profilometers.
563914	Magnetic particle inspection machines.
5651–56519	Hardness testing machines.
5653–56539	Pressure testing machines.
5656–5656323	Balancing machines.
56572–565729	Gear measuring and treating machines.
56573–565739	Hob, worn and cutter measuring machines.
565742	Surface finish measuring machines.

Subpart G—Use of Government-Owned Industrial Facilities and Special Tooling on Work for Foreign Governments

§ 13.700 Scope of subpart.

This subpart covers use by contractors of Government-owned industrial facilities and special tooling on work for a foreign government.

§ 13.701 Use without charge.

Upon the request of a foreign government, industrial facilities and special tooling located within the United States, its Territories, its possessions, or Puerto Rico, may be authorized for use, without charge, on contracts of the foreign government or subcontracts thereunder, if:

(a) Such use is approved by the Secretary or his designee;

(b) The foreign government would be authorized to place the contract with the Department concerned under the Mutual Security Act of 1954 as amended, or such use is legally authorized by an agreement with the foreign government;

(c) The foreign government's placing of the contract directly with the contractor is consistent with the best interests of the United States;

(d) Such use will not interfere with foreseeable United States requirements;

(e) Such use does not place the user in a favored competitive position; and

(f) The contractor agrees that no charge for the use of the facilities or tooling shall be included in the price charged the foreign government under the contract.

Subpart H—Transfer of Title to Equipment to Nonprofit Education or Research Institutions

§ 13.800 Scope of subpart.

This subpart implements P.L. 85–934, section 2 which gives the Department of Defense discretionary authority to vest in nonprofit institutions of higher education or nonprofit organizations whose primary purpose is the conduct of scientific research, without further obligation to the Government or on such other terms and conditions as may be appropriate, title to equipment purchased with funds available for grants or contracts for the conduct of basic or applied research.

§ 13.801 Purpose of the legislation.

The general purpose of the legislation implemented by this subpart is to facilitate the scientific research performed under contract for the Government by the nonprofit institutions and organizations described in § 13.800. It is intended to permit the elimination of the record-keeping required when the Government retains title to equipment furnished or purchased under a research contract, in those cases where the cost of such record-keeping to the contractor or to the Government is out of proportion to the value of the equipment. It is further intended to reduce where desirable the time and labor involved in formally circulating through the Government long lists of highly specialized or minor items of equipment or in relocating major equipment when such relocation is impracticable or uneconomical and not required for other research programs of the Government. Finally, it is intended to provide a measure of administrative flexibility when, from the standpoint of increased research effectiveness and in the absence of other Departmental or Governmental requirements, it is desirable to transfer title to equipment to such research contractors.

§ 13.802 Transfer of title.

(a) Contracts with nonprofit institutions of higher education or nonprofit organizations whose primary purpose is the conduct of scientific research may provide, or may be amended to provide, that the contracting officer may transfer title to equipment to the contractor. In connection with any such contract which so provides, the contracting officer may vest in the contractor title to any equipment purchased at any time with funds which were available for grants or contracts for the conduct of basic or applied research, if not prohibited by controls governing the equipment involved, and if it is determined that such vesting is in furtherance of the objectives of the Department or agency concerned, and either—

(1) As to each item of equipment having an acquisition cost of $1,000 or less, that—

(i) Retention of title in the Government would create an administrative burden not warranted by the value of the equipment, or

(ii) The keeping of inventory and records by the contractor would become prohibitively complicated or expensive; or

(2) As to any item of equipment—

(i) That the item is of such nature that it would be impracticable or uneconomical to remove it from the contractor's possession, or

(ii) After a reasonable check by the contracting officer, commensurate with the value of the item involved, that there is no requirement within the Department of Defense for the item: *Provided,* That, if the acquisition cost of the item exceeds $25,000, the item shall be further screened in accordance with Departmental procedures.

(b) The vesting of title as provided in paragraph (a) of this section shall be accomplished following a written determination by the contracting officer that

the applicable criteria in paragraph (a) of this section have been met. With respect to items of equipment having an acquisition cost in excess of $1,000, such determination shall be subject to prior approval in accordance with Departmental procedures.

(c) Where title to equipment is vested pursuant to paragraph (a) of this section, the contractor shall be without further obligation to the Government with respect to such equipment, except that the contractor must agree, as a condition to taking title, that no charge will be made to the Government for any depreciation, amortization, or use charge with respect to such equipment under any existing or future Government contract.

§ 13.803 Contract clauses.

Where it is anticipated that title to equipment may be vested in the contractor in accordance with this Part, the alternate clause in § 13.505(c) shall be included in fixed-price research and development contracts and the alternate clauses in § 13.506 (c) and (d) will be inserted in cost-reimbursement research and development contracts.

PART 14—INSPECTION AND ACCEPTANCE

Sec.

14.000 Scope of part.

Subpart A—Inspection

14.100 Definitions.
14.100-1 Inspection.
14.100-2 Testing.
14.101 General.
14.102 Activities responsible for inspection.
14.103 Inspection interchange agreements.
14.104 Contractor responsibility.
14.105 Places of inspection.
14.105-1 General.
14.105-2 Inspection at source.
14.105-3 Inspection at destination.
14.106 Inspection of small purchases ($2,500 or less).
14.107 Rejection of nonconforming supplies or services.
14.108 Government inspection under subcontracts.
14.109 Inspection for foreign governments.

Subpart B—Acceptance

14.201 General.
14.202 Delivery under F.O.B. origin contracts.
14.203 Point of acceptance.
14.204 Responsibility for acceptance.
14.205 Acceptance of supplies or services not conforming with contract requirements.

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§ 14.000 Scope of part.

This part deals with inspection and acceptance under contracts for supplies (other than construction contracts or services).

Subpart A—Inspection

§ 14.100 Definitions.

§ 14.100-1 Inspection.

Inspection means the examination (including testing) of supplies and services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether the supplies and services conform to contract requirements, including all applicable drawings, specifications, and purchase descriptions.

§ 14.100-2 Testing.

Testing is an element of inspection and generally denotes the determination by technical means of the physical and chemical properties or elements of materials, supplies, or components thereof, involving not so much the element of personal judgment as the application of established scientific principles and procedures.

§ 14.101 General.

(a) Inspection on behalf of the Government shall be conducted in all cases prior to acceptance, except as permitted by § 14.204. Inspection shall be accomplished by or under the supervision of Government personnel. Except as otherwise provided in the contract, test requirements may be performed in the contractor's or subcontractor's laboratory or any other commercial laboratory acceptable to the Government. The contractor may be required under the terms of the contract to establish and maintain an acceptable inspection or quality control system to assure compliance with contract specifications with a minimum of Government inspection supervision. A manufacturer's certificate or other statement of quality or quantity may be considered in determining whether supplies or services are in conformity with the contract; but no provision of the contract shall preclude the Government from performing inspection.

(b) The type and extent of inspection needed depend on the particular procurement. For example, on items which would involve small losses in the event of defects and which would probably be replaced by suppliers without contest, inspection may consist only of checks for identity, quantity, and shipping damage.

§ 14.102 Activities responsible for inspection.

Inspection, or the arrangement therefor, is the responsibility of the contracting activity. Where a department or activity uses the inspection services of another department or activity, the department or activity performing such inspection has primary inspection cognizance and its inspection determinations are binding on the department or activity for which the inspection services are performed. In coordinated or interdepartmental procurements, where Government inspection is to be made at the

source, it generally will be made by inspectors of the contracting agency; but this general rule does not alter inspection interchange agreements or preclude the use of inspections of another department or activity located at or servicing the contractor's plant. Where Government inspection at destination is required in coordinated or interdepartmental procurements, the requiring agency or activity may be requested to arrange for the inspection.

§ 14.103 Inspection interchange agreements.

By appropriate inspection interchange agreements, departments and activities shall provide for the use of inspection services of other departments or Government agencies to assure the most economical and effective inspection consistent with the best interest of the Government. Wherever there are multiple Government inspection assignments in a supplier's plant, each of the activities involved shall arrange for the interchange of inspection services, except that contracts involving special requirements may be exempted in accordance with policies established by the Department of Defense. Inspection interchange agreements should be designed to eliminate duplication, overlapping, or multiple assignments of Government inspection activities in any one plant. Departmental procedures generally should permit detailed inspection interchange agreements to be initiated and completed at the operating level. Inspection interchange agreements shall be in accordance with the following:

(a) When inspection is to be made by other military procuring activities or military departments, such inspection shall be performed without reimbursement except to the extent that reimbursement in kind is practicable;

(b) When inspection is to be made by or for other Government agencies, such inspection will be on a mutually acceptable basis; and

(c) All agreements shall include specific provisions for: (1) Use of the practices, records, and forms of the activity performing inspection, unless the use of others is mutually agreeable; (2) channels of communication; and (3) designation of source and delivery date of any Government inspection equipment to be supplied.

§ 14.104 Contractor responsibility.

The standard inspection clauses in Part 7 of this chapter require the contractor to maintain an inspection system acceptable to the Government and records of all inspection work performed by the contractor. The contractor's inspection system should be such as to provide reasonable assurance that the supplies subject to inspection will conform to contract requirements and should include any quality control procedures necessary to this end. Contracts for complex supplies shall include the Quality Control System clause in § 7.104–28 of this chapter. This clause specifically requires contractors to maintain a quality control system acceptable to the Government. In this regard the Contracting Officer, or his representatives, shall assure that the contractor maintains quality control measures for all manufacturing processes and documentation pertinent to quality, testing and inspection, fabrication, and delivery. Government inspection activities shall plan and conduct systematic evaluation and verification of suppliers' inspection systems, quality control systems, and supplies, for the purpose of obtaining the maximum assurance of quality consistent with efficient use of Government and contractor manpower and facilities. In any case, when Military or Federal specifications are used to establish requirements in the contract, the supplier shall be required to perform all examinations and tests called for by the specifications except those which the Government is expressly required to make.

§ 14.105 Places of inspection.

§ 14.105–1 General.

Each contract shall designate the place or places of inspection. Inspection of supplies and services shall be made at such times and places (including any stage at the period of manufacture, and including subcontractors' plants) as are necessary to determine that the supplies and services conform to contract requirements. Where the contract provides for inspection at source, shipment prior to inspection may be authorized if it is determined to be in the best interest of the Government. In such cases, to the extent appropriate, the contract should be modified prior to shipment with respect to (a) risk of loss in transit and (b) shipping and other expenses incurred in the event of rejection at destination.

§ 14.105–2 Inspection at source.

Supplies and services shall be inspected at source where:

(a) Inspection at any other point would require uneconomical disassembly or destructive testing;

(b) Considerable loss would result from the manufacture and shipment of unacceptable supplies or from the delay in making necessary corrections;

(c) Special instruments, gauges, or facilities required for inspection are available only at source;

(d) Inspection at any other point would destroy or require the replacement of costly special packing and packaging;

(e) Quality control and inspection are closely related to production methods;

(f) Supplies requiring technical inspection are destined for points of embarkation for oversea shipment; or

(g) Otherwise determined to be in the best interest of the Government.

§ 14.105–3 Inspection at destination.

Supplies and services shall be inspected at destination where:

(a) Deliveries of supplies purchased "off the shelf" are made from a point other than that of manufacture;

(b) Necessary testing equipment is located only at destination;

(c) Biologicals being purchased are processed under direct control of the National Institutes of Health or the Federal Food and Drug Administration;

(d) Perishable subsistence supplies are purchased within the United States, except that perishable subsistence supplies destined for oversea shipment will normally be inspected for condition and quantity at points of embarkation;

(e) Brand name items are purchased for authorized resale, except that where supplies are destined for direct overseas shipment, inspection (and acceptance) will be made by the contracting officer or the official charged with such responsibility on the basis of a tally sheet evidencing receipt of shipment signed by the port transportation officer or other designated official at the transshipment point; or

(f) Otherwise determined to be in the best interest of the Government.

§ 14.106 Inspection of small purchases ($2,500 or less).

(a) This section applies to all small purchases, including items described in Federal and Military specifications, and qualified products. In determining the type and extent of Government inspection to be required on small purchases, the smallness of possible losses and the likelihood of uncontested replacement of defective articles shall be considered.

(b) Generally, inspection of small purchases shall be at destination. Purchasers, users, and installers may be considered inspectors for small purchase inspection purposes.

(c) Unless detailed technical inspection is necessary, inspection shall consist of examination of (1) type and kind, (2) quantity, (3) damage, (4) operability, if readily determinable, and (5) packaging and marking, if applicable.

(d) Detailed technical inspection shall be performed if special specifications are involved or if defective supplies can harm personnel or equipment.

(e) Detailed technical inspection may be limited to a check of characteristics that require separate specifications and of those likely to cause harm. Such inspection may be limited to inspection of occasional purchases of the same item from the same manufacturing source when there is good reason to rely upon the integrity of the manufacturer because of known safeguards and a significant history of defect-free purchases.

(f) Adjustments for short shipments or defective supplies shall be requested from suppliers when recovery will benefit the Government.

§ 14.107 Rejection of nonconforming supplies or services.

Contractors ordinarily shall be given an opportunity to correct or replace nonconforming supplies or services if this can be done within the required delivery schedule. Unless the contract provides otherwise, such correction or replacement shall be without additional cost to the Government. Notices of rejection of nonconforming supplies or services need not be in writing unless (a) the supplies have been delivered to a point other than the contractor's plant, (b) the contractor persists in offering nonconforming supplies or services for acceptance, or (c) delivery or performance is overdue without excusable cause. The reasons for

rejection normally shall be stated, and the contractor may be given any suggestions that might help in eliminating the cause of rejection. If timely notice of rejection is not furnished to the contractor, acceptance may in certain cases be implied as a matter of law from such omission. Therefore, notices of rejection should be furnished promptly to contractors whenever rejection is intended.

§ 14.108 Government inspection under subcontracts.

Government inspection of subcontracted supplies shall be made only when required in the interest of the Government. The primary purpose of subcontract inspection is to assist the Government inspector at the prime contractor's plant in determining the conformance of supplies with contract requirements. It does not relieve the prime contractor of any of his responsibilities under the contract. Supplies that do not qualify under the criteria in § 14.105–2 for Government inspection at source shall not be inspected by the Government at the subcontractor's plant. Supplies for which certificates, records, reports, and similar evidence of quality are available at the prime contractor's plant shall not be Government inspected at the subcontractor's plant except occasionally to verify such evidence. However, Government inspection shall be performed at a subcontractor's plant whenever the Government contract requires. All oral and written statements and contract provisions relating to the inspection of subcontracted supplies shall be worded as not to (a) affect the contractual relationship between the prime contractor and the Government or between the prime contractor and the subcontractor, (b) establish a contractual relationship between the Government and the subcontractor or (c) constitute a waiver of the Government's right to inspect or reject supplies.

§ 14.109 Inspection for foreign governments.

Inspection will be performed only for friendly foreign governments or international agencies and shall be administered in accordance with the foreign policy and security objectives of the United States. Such inspection will be provided only where consistent with or required by legislation, executive orders, or Department of Defense or Departmental policies concerning mutual security programs, setting forth foreign policy and security objectives. When inspection is performed outside the United States, the levels of technical capability and the administrative procedures not already prescribed in existing laws, Executive Orders, or Department of Defense policies will be in accordance with arrangements suitable and acceptable to United States country teams or commanders of unified and special commands, as appropriate.

Subpart B—Acceptance

§ 14.201 General.

As used in Department of Defense contracts, "acceptance" generally means the act of an authorized representative of the Government by which the Government assents to ownership by it of existing and identified supplies, or approves specific services rendered, as partial or complete performance of the contract. Except as provided in § 14.205, and subject to other terms and conditions of the contract, the Government thereby acknowledges that the supplies or services are in conformity with contract requirements, including those of quality, quantity, packaging, and marking. Depending upon the provisions of the contract, acceptance may be effected prior to, at the time of, or after delivery. However, supplies and services shall not be accepted prior to inspection, except as permitted in § 14.204. Acceptance shall ordinarily be accomplished by execution of an acceptance certificate on the applicable inspection and receiving report form (for example, DD Form 250, DD Form 1155, or Standard Form 44). Where acceptance is accomplished at a point other than destination, supplies shall not be reinspected at destination for acceptance purposes.

§ 14.202 Delivery under F.O.B. origin contracts.

(a) Satisfactory evidence of delivery is required before payment other than progress or advance payments may be made under fixed-price supply contracts. Under contracts calling for deliveries F.O.B. origin, the contracting officer or his authorized representative, in certifying that delivery has been made, may in his discretion rely on the contractor's signed statement on his invoice that delivery has been made on a specified date to a named carrier or to a representative of the Government. When necessary to protect the Government's interest, the contracting officer may require either that the contractor furnish a receipted copy of the bill of lading or postal receipt, or that a representative of the Government certify as to actual delivery on the applicable inspection and receiving report form. Invoicing instructions to F.O.B. origin contractors shall require that the contractor state on all invoices (1) the date of shipment, name of carrier, and bill of lading number, or (2) the name and title of the Government representative to whom delivery was made and date of such delivery.

(b) Where payment has been made on the basis of a certificate, and the supplies have not been received at destination, prompt follow-up and remedial action will be initiated.

§ 14.203 Point of acceptance.

Each contract shall specify the point of acceptance. Contracts which provide for delivery F.O.B. destination shall provide for acceptance at destination whether inspection is to occur at destination or at origin. Contracts which provide for delivery F.O.B. origin shall ordinarily provide for acceptance (and inspection) at origin.

§ 14.204 Responsibility for acceptance.

(a) Acceptance is the responsibility of the contracting officer, or his authorized representative. Where an activity uses services of another activity or Department for the purpose of acceptance, acceptance by the other activity or Department is binding on the activity for which the services are performed.

(b) A supplier's certificate of conformance with requirements may be considered a proper element incident to acceptance of supplies or services. A contractor's certificate may be used for Government acceptance prior to inspection. At the discretion of the contracting officer, a clause may be inserted in contracts requiring the contractor to certify that supplies comply with contract requirements. Where acceptance precedes inspection, however, a clause will be used to reserve the Governments' right after acceptance to inspect the supplies within a reasonable time after delivery and to reject defective items. Certificates of conformance shall be required by the contract when the value of supplies or the condition of purchase, delivery, receipt, or use thereof make it desirable to have additional assurance that supplies conform to contract requirements.

§ 14.205 Acceptance of supplies or services not conforming with contract requirements.

When supplies or services tendered for acceptance do not conform with contract requirements, the applicable contract provisions shall govern the action to be taken. See § 14.107. For reasons of economy or the urgency of the requirement, acceptance of supplies or services which do not meet all contract requirements may occasionally be desirable. Prior to such acceptance, the contracting officer shall obtain the approval of the requiring activity where the nonconformity with contract requirements (a) affects matters such as safety, durability, performance, or interchangeability of parts or assemblies, (b) results in material increases in weight, where weight is a significant consideration, or (c) affects the basic objectives of the specifications. Acceptance of these types of nonconforming supplies or services shall be covered by an appropriate modification of the contract. Acceptance of other types of nonconforming supplies and services shall be covered by contract modification if determined necessary by the contracting officer.

PART 15—CONTRACT COST PRINCIPLES AND PROCEDURES

Sec.

15.000 Scope of part.

Subpart A—Applicability

15.101 Scope of subpart.
15.102 Cost-reimbursement supply and research contracts with concerns other than educational institutions.
15.103 Cost-reimbursement research contracts with educational institutions.
15.104 Cost-reimbursement construction contracts.
15.105 Cost-reimbursement facilities contracts.
15.106 Use of cost principles for fixed-price contracts.
15.107 Advance understandings on particular cost items.

Subpart B—Principles and Procedures for Use in Cost-Reimbursement Type Supply and Research Contracts With Commercial Organizations

15.201 Basic considerations.
15.201–1 Composition of total cost.
15.201–2 Factors affecting allowability of costs.
15.201–3 Definition of reasonableness.
15.201–4 Definition of allocability.
15.201–5 Credits.
15.202 Direct costs.
15.203 Indirect costs.
15.204 Application of principles and procedures.
15.205 Selected costs.
15.205–1 Advertising costs.
15.205–2 Bad debts.
15.205–3 Bidding costs.
15.205–4 Bonding costs.
15.205–5 Civil defense costs.
15.205–6 Compensation for personal services.
15.205–7 Contingencies.
15.205–8 Contributions and donations.
15.205–9 Depreciation.
15.205–10 Employee morale, health, and welfare costs and credits.
15.205–11 Entertainment costs.
15.205–12 Excess facility costs.
15.205–13 Fines and penalties.
15.205–14 Food service and dormitory costs and credits.
15.205–15 Fringe benefits.
15.205–16 Insurance and indemnification.
15.205–17 Interest and other financial costs.
15.205–18 Labor relations costs.
15.205–19 Losses on other contracts.
15.205–20 Maintenance and repair costs.
15.205–21 Manufacturing and production engineering costs.
15.205–22 Material costs.
15.205–23 Organization costs.
15.205–24 Other business expenses.
15.205–25 Overtime, extra-pay shift and multi-shift premiums.
15.205–26 Patent costs.
15.205–27 Pension plans.
15.205–28 Plant protection costs.
15.205–29 Plant reconversion costs.
15.205–30 Precontract costs.
15.205–31 Professional service costs; legal, accounting, engineering, and other.
15.205–32 Profits and losses on disposition of plant, equipment, or other capital assets.
15.205–33 Recruiting costs.
15.205–34 Rental costs (including sale and leaseback of facilities).
15.205–35 Research and development costs.
15.205–36 Royalties and other costs for use of patents.
15.205–37 Selling costs.
15.205–38 Service and warranty costs.
15.205–39 Severance pay.
15.205–40 Special tooling costs.
15.205–41 Taxes.
15.205–42 Termination costs.
15.205–43 Trade, business, technical and professional activity costs.
15.205–44 Training and educational costs.
15.205–45 Transportation costs.
15.205–46 Travel costs.

Subpart C—Research Contracts With Educational Institutions

15.301 General.
15.302 Definitions.
15.302–1 Research agreements.
15.302–2 Apportionment.
15.302–3 Allocation.
15.302–4 Sponsoring agency.
15.302–5 Original complement.
15.302–6 Other institutional activities.
15.303 Direct costs.
15.304 Indirect costs.
15.305 Applicable costs.
15.306 Determination of indirect costs.
15.306–1 General.
15.306–2 Apportionment.
15.306–3 Allocation.
15.306–4 Overhead determinations acceptable under special circumstances.
15.307 General standards for selected items of cost.
15.307–1 Purpose and applicability.
15.307–2 Costs applicable to instruction.
15.307–3 Allowable and unallowable costs.

Subpart D—Construction Contracts

15.401 Definition of construction contract.
15.402 General basis for determination of costs.
15.403 Examples of items of allowable costs.
15.404 Examples of items of unallowable costs.
15.405 Examples of subjects requiring special considerations.
15.406 Cost interpretation of pension and retirement plans.

Subpart E—[Reserved]

Subpart F—Guidelines for Application in the Negotiation and Administration of Fixed-Price Type Contracts and in the Negotiation of Termination Settlements

15.600 Scope of subpart.
15.601 Definition of fixed-price type contracts.
15.602 Basic considerations.
15.603 Cost principles and their use.

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§ 15.000 Scope of part.

This part contains general cost principles and procedures for the determination and allowance of costs in connection with the negotiation and administration of cost-reimbursement type contracts and contains guidelines for use, where appropriate, in the evaluation of costs in connection with certain negotiated fixed-price type contracts and contracts terminated for the convenience of the Government.

Subpart A—Applicability

§ 15.101 Scope of subpart.

This subpart describes the applicability of succeeding subparts of this part to the various types of contracts in connection with which cost principles and procedures are used.

§ 15.102 Cost-reimbursement supply and research contracts with concerns other than educational institutions.

This category includes all cost-reimbursement type contracts (§ 3.404 of this chapter) for supplies, services, or experimental, developmental, or research work (other than with educational institutions, as to which § 15.103 applies), except that it does not include facilities contracts (see § 15.105) or construction contracts (see § 15.104). The cost principles and procedures set forth in Subpart B of this part shall be incorporated by reference in cost-reimbursement supply and research contracts with other than educational institutions as the basis—

(a) For determination of reimbursable costs under such contracts, including cost-reimbursement type subcontracts thereunder, and the cost-reimbursement portion of time-and-materials contracts (§ 3.405–1 of this chapter);

(b) For the negotiation of overhead rates (Subpart G, Part 3 of this chapter); and

(c) For the determination of costs of terminated cost-reimbursement type contracts where the contractor elects to "voucher out" its costs (Subpart D, Part 8, of this chapter), and for settlement of such contracts by determination (§ 8.209–7 of this chapter).

§ 15.103 Cost-reimbursement research contracts with educational institutions.

This category includes all cost-reimbursement type contracts (§ 3.404 of this chapter) for experimental, developmental, or research work with educational institutions. The cost principles and procedures set forth in Subpart C of this part shall be incorporated by reference in cost-reimbursement research contracts with educational institutions as the basis—

(a) For determination of reimbursable costs under cost-reimbursement type contracts, including cost-reimbursement type subcontracts thereunder;

(b) For the negotiation of overhead rates (Subpart G, Part 3 of this chapter); and

(c) For the determination of costs of terminated cost-reimbursement type contracts where the contractor elects to "voucher out" its costs (Subpart D, Part 8, of this chapter), and for settlement of such contracts by determination (§ 8.209–7 of this chapter).

In addition, Subpart C of this part is to be used in determining the allowable costs of research and development performed by educational institutions under grants.

§ 15.104 Cost-reimbursement construction contracts.

This category includes all cost-reimbursement type contracts (§ 3.404 of this chapter) for the construction, alteration, or repair of buildings, bridges, roads, or other kinds of real property. It also includes cost-reimbursement type contracts for architect-engineer services related to such construction. It does not include contracts for vessels, aircraft, or other kinds of personal property. The cost principles and procedures set forth in Subpart D of this part, shall be incor-

porated by reference in cost-reimbursement construction contracts as the basis—

(a) For determination of reimbursable costs under cost-reimbursement type contracts, including cost-reimbursement type subcontracts thereunder;

(b) For the negotiation of overhead rates (Subpart G, Part 3, of this chapter); and

(c) For the determination of costs of terminated cost-reimbursement type contracts where the contractor elects to "voucher out" its costs (Subpart D, Part 8, of this chapter), and for settlement of such contracts by determination (§ 8.209–7 of this chapter).

§ 15.105 Cost-reimbursement facilities contracts.

[Reserved]

§ 15.106 Use of cost principles for fixed-price contracts.

Subpart F of this part provides guidance for the use of Subparts B, C and D of this part where appropriate, in the evaluation of costs in connection with the negotiation of certain fixed-price type contracts and termination settlements.

§ 15.107 Advance understandings on particular cost items.

The extent of allowability of the selected items of cost covered in Subparts B to E of this part has been stated to apply broadly to many accounting systems in varying contract situations. Thus, as to any given contract, the reasonableness and allocability of certain items of cost may be difficult to determine, particularly in connection with firms or separate divisions thereof which may not be subject to effective competitive restraints. In order to avoid possible subsequent disallowance or dispute based on unreasonableness or nonallocability, it is important that prospective contractors, particularly those whose work is predominantly or substantially with the Government, seek agreement with the Government in advance of the incurrence of special or unusual costs in categories where reasonableness or allocability are difficult to determine. Such agreement may also be initiated by contracting officers individually, or jointly, for all defense work of the contractor, as appropriate. Any such agreement should be incorporated in cost-reimbursement type contracts, or made a part of the contract file in the case of negotiated fixed-price type contracts, and should govern the cost treatment covered thereby throughout the performance of the contract. But the absence of such an advance agreement on any element of cost will not, in itself, serve to make that element either allowable or unallowable. Examples of costs on which advance agreements may be particularly important:

(a) Compensation for personal services;

(b) Use charge for fully depreciated assets;

(c) Deferred maintenance costs;

(d) Pre-contract costs;

(e) Research and development costs;

(f) Royalties;

(g) Selling and distribution costs; and

(h) Travel costs, as related to special or mass personnel movement.

Subpart B—Principles and Procedures for Use in Cost-Reimbursement Type Supply and Research Contracts With Commercial Organizations

§ 15.201 Basic considerations.

§ 15.201–1 Composition of total cost.

The total cost of a contract is the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allocable credits. In ascertaining what constitutes costs, any generally accepted method of determining or estimating costs that is equitable under the circumstances may be used, including standard costs properly adjusted for applicable variances.

§ 15.201–2 Factors affecting allowability of costs.

Factors to be considered in determining the allowability of individual items of cost include (a) reasonableness, (b) allocability, (c) application of those generally accepted accounting principles and practices appropriate to the particular circumstances, and (d) any limitations or exclusions set forth in this subpart, or otherwise included in the contract as to types or amounts of cost items.

§ 15.201–3 Definition of reasonableness.

A cost is reasonable if, in its nature or amount, it does not exceed that which would be incured by an ordinarily prudent person in the conduct of competitive business. The question of the reasonableness of specific costs must be scrutinized with particular care in connection with firms or separate divisions thereof which may not be subject to effective competitive restraints. What is reasonable depends upon a variety of considerations and circumstances involving both the nature and amount of the cost in question. In determining the reasonableness of a given cost, consideration shall be given to:

(a) Whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;

(b) The restraints or requirements imposed by such factors as generally accepted sound business practices, arm's length bargaining, Federal and State laws and regulations, and contract terms and specifications;

(c) The action that a prudent business man would take in the circumstances, considering his responsibilities to the owners of the business, his employees, his customers, the Government and the public at large; and

(d) Significant deviations from the established practices of the contractor which may unjustifiably increase the contract costs.

§ 15.201–4 Definition of allocability.

A cost is allocable if it is assignable or chargeable to a particular cost objective, such as a contract, product, product line, process, or class of customer or activity, in accordance with the relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it—

(a) Is incurred specifically for the contract;

(b) Benefits both the contract and other work, or both Government work and other work, and can be distributed to them in reasonable proportion to the benefits received; or

(c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

§ 15.201–5 Credits.

The applicable portion of any income, rebate, allowance, and other credit relating to any allowable cost, received by or accruing to the contractor, shall be credited to the Government either as a cost reduction or by cash refund, as appropriate.

§ 15.202 Direct costs.

(a) A direct cost is any cost which can be identified specifically with a particular cost objective. Direct costs are not limited to items which are incorporated in the end product as material or labor. Costs identified specifically with the contract are direct costs of the contract and are to be charged directly thereto. Costs identified specifically with other work of the contractor are direct costs of that work and are not to be charged to the contract directly or indirectly. When items ordinarily chargeable as indirect costs are charged to Government work as direct costs, the cost of like items applicable to other work of the contractor must be eliminated from indirect costs allocated to Government work.

(b) This definition shall be applied to all items of cost of significant amount unless the contractor demonstrates that the application of any different current practice achieves substantially the same results. Direct cost items of minor amount may be distributed as indirect costs as provided in § 15.203.

§ 15.203 Indirect costs.

(a) An indirect cost is one which, because of its incurrence for common or joint objectives, is not readily subject to treatment as a direct cost. Minor direct cost items may be considered to be indirect costs for reasons of practicality. After direct costs have been determined and charged directly to the contract or other work as appropriate, indirect costs are those remaining to be allocated to the several classes of work.

(b) Indirect costs shall be accumulated by logical cost groupings with due consideration of the reasons for incurring the costs. Each grouping should be determined so as to permit distribution of the grouping on the basis of the benefits accruing to the several cost objectives. Commonly, manufacturing overhead, selling expenses, and general and administrative expenses are separately grouped. Similarly, the particular case may require subdivisions of these groupings, e.g., building occupancy costs might be separable from those of personnel administration within the manufacturing

overhead group. The number and composition of the groupings should be governed by practical considerations and should be such as not to complicate unduly the allocation where substantially the same results are achieved through less precise methods.

(c) Each cost grouping shall be distributed to the appropriate cost objectives. This necessitates the selection of a distribution base common to all cost objectives to which the grouping is to be allocated. The base should be selected so as to permit allocation of the grouping on the basis of the benefits accruing to the several cost objectives. This principle for selection is not to be applied so rigidly as to complicate unduly the allocation where substantially the same results are achieved through less precise methods.

(d) The method of allocation of indirect costs must be based on the particular circumstances involved. The method shall be in accord with those generally accepted accounting principles which are applicable in the circumstances. The contractor's established practices, if in accord with such accounting principles, shall generally be acceptable. However, the methods used by the contractor may require re-examination when:

(1) Any substantial difference occurs between the cost patterns of work under the contract and other work of the contractor; or

(2) Any significant change occurs in the nature of the business, the extent of subcontracting, fixed asset improvement programs, the inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances.

(e) A base period for allocation of indirect costs is the period during which such costs are incurred and accumulated for distribution to work performed in that period. Normally, the base period will be the contractor's fiscal year; however, use of a shorter period may be appropriate in case of (1) contracts whose performance involves only a minor portion of the fiscal year, or (2) where it is general practice in the industry to use a shorter period. In any event the base period or periods shall be so selected as to avoid inequities in the allocation of costs. When the contract is performed over an extended period of time, as many such base periods will be used as will be required to represent the period of contract performance.

§ 15.204 Application of principles and procedures.

(a) Costs shall be allowed to the extent that they are reasonable (see § 15.201–3), allocable (see § 15.201–4), and determined to be allowable in view of the other factors set forth in §§ 15.201–2 and 15.205. These criteria apply to all of the selected items of cost which follow, notwithstanding that particular guidance is provided in connection with certain specific items for emphasis or clarity.

(b) Costs incurred as reimbursements to a subcontractor under a cost-reimbursement type subcontract of any tier above the first fixed-price subcontract are allowable to the extent that allowance is consistent with the subpart of this part which is appropriate to the subcontract involved. Thus, if the subcontract is for supplies, such costs are allowable to the extent that the subcontractor's costs would be allowable if this subpart were incorporated in the subcontract; if the subcontract is for construction, such costs are allowable to the extent that the subcontractor's costs would be allowable if Subpart D of this part were incorporated in the subcontract.

(c) Selected items of cost are treated in § 15.205. However, § 15.205 does not cover every element of cost and every situation that might arise in a particular case. Failure to treat any item of cost in § 15.205 is not intended to imply that it is either allowable or unallowable. With respect to all items, whether or not specifically covered, determination of allowability shall be based on the principles and standards set forth in this subpart and, where appropriate, the treatment of similar or related selected items.

§ 15.205 Selected costs.

§ 15.205–1 Advertising costs.

(a) Advertising costs mean the costs of advertising media and corollary administrative costs. Advertising media include magazines, newspapers, radio and television programs, direct mail, trade papers, outdoor advertising, dealer cards and window displays, conventions, exhibits, free goods and samples, and the like. The following advertising costs are allowable:

(1) Advertising in trade and technical journals: *Provided,* Such advertising does not offer specific products or services for sale but is placed in journals which are valuable for dissemination of technical information within the contractor's industry;

(2) Help-wanted advertising, as set forth in § 15.205–33, when considered in conjunction with all other recruitment costs;

(3) Costs of participation in exhibits—

(i) Upon invitation of the Government, or

(ii) Which exhibits are for the purpose of disseminating technical information within the contractor's industry; however, such costs are not allowable under this subdivision if the exhibit offers specific products or services for sale;

(4) Advertising for the exclusive purpose of obtaining scarce materials, plant, or equipment, or disposing of scrap or surplus materials, in connection with the contract.

(b) Except as provided above, all other advertising costs are unallowable.

§ 15.205–2 Bad debts.

Bad debts, including losses (whether actual or estimated) arising from uncollectible customers' accounts and other claims, related collection costs, and related legal costs, are unallowable.

§ 15.205–3 Bidding costs.

Bidding costs are the costs of preparing bids or proposals on potential Government and non-Government contracts or projects, including the development of engineering data and cost data necessary to support the contractor's bids or proposals. Bidding costs of the current accounting period of both successful and unsuccessful bids and proposals normally will be treated as allowable indirect costs, in which event no bidding costs of past accounting periods shall be allowable in the current period to the Government contract. However, if the contractor's established practice is to treat bidding costs by some other method, the results obtained may be accepted only if found to be reasonable and equitable.

§ 15.205–4 Bonding costs.

(a) Bonding costs arise when the Government requires assurance against financial loss to itself or others by reason of the act or default of the contractor. They arise also in instances where the contractor requires similar assurance. Included are such bonds as bid, performance, payment, advance payment, infringement, and fidelity bonds.

(b) Costs of bonding required pursuant to the terms of the contract are allowable.

(c) Costs of bonding required by the contractor in the general conduct of his business are allowable to the extent that such bonding is in accordance with sound business practice and the rates and premiums are reasonable under the circumstances.

§ 15.205–5 Civil defense costs.

(a) Civil defense costs are those incurred in planning for, and the protection of life and property against, the possible effects of enemy attack. Reasonable costs of civil defense measures (including costs in excess of normal plant protection costs, first-aid training and supplies, fire fighting training and equipment, posting of additional exit notices and directions, and other approved civil defense measures) undertaken on the contractor's premises pursuant to suggestions or requirements of civil defense authorities are allowable when allocated to all work of the contractor.

(b) Costs of capital assets under paragraph (a) of this section are allowable through depreciation in accordance with § 15.205–9.

(c) Contributions to local civil defense funds and projects are unallowable.

§ 15.205–6 Compensation for personal services.

(a) *General.* (1) Compensation for personal services includes all remuneration paid currently or accrued, in whatever form and whether paid immediately or deferred, for services rendered by employees to the contractor during the period of contract performance. It includes, but is not limited to, salaries, wages, directors' and executive committee members' fees, bonuses (including stock bonuses), incentive awards, employee stock options, employee insurance, fringe benefits, and contributions to pension, annuity, and management employee

incentive compensation plans. Except as otherwise specifically provided in this § 15.205–6, such costs are allowable to the extent that the total compensation of individual employees is reasonable for the services rendered and they are not in excess of those costs which are allowable by the Internal Revenue Code and regulations thereunder.

(2) Compensation is reasonable to the extent that the total amount paid or accrued is commensurate with compensation paid under the contractor's established policy and conforms generally to compensation paid by other firms of the same size, in the same industry, or in the same geographic area, for similar services. In the administration of this principle, it is recognized that not every compensation case need be subjected in detail to the above tests. Such tests need be applied only to those cases in which a general review reveals amounts or types of compensation which appear unreasonable or otherwise out of line. However, certain conditions give rise to the need for special consideration and possible limitation as to allowability for contract cost purposes where amounts appear excessive. Among such conditions are the following:

(i) Compensation to owners of closely held corporations, partners, sole proprietors, or members of the immediate families thereof, or to persons who are contractually committed to acquire a substantial financial interest in the contractor's enterprise. Determination should be made that such compensation is reasonable for the actual personal services rendered rather than a distribution of profits.

(ii) Any change in a contractor's compensation policy resulting in a substantial increase in the contractor's level of compensation, particularly when it was concurrent with an increase in the ratio of Government contracts to other business, or any change in the treatment of allowability of specific types of compensation due to changes in Government policy.

(iii) The contractor's business is such that his compensation levels are not subject to the restraints normally occurring in the conduct of competitive business.

(3) Compensation in lieu of salary for services rendered by partners and sole proprietors will be allowed to the extent that it is reasonable and does not constitute a distribution of profits.

(4) In addition to the general requirements set forth in subparagraphs (1) through (3) of this paragraph, certain forms of compensation are subject to further requirements as specified in paragraphs (b) through (i) of this section.

(b) *Salaries and wages.* Salaries and wages for current services include gross compensation paid to employees in the form of cash, products, or services, and are allowable. However, premiums for overtime, extra-pay shifts, and multishift work are allowable to the extent approved pursuant to § 12.102–4 of this chapter or permitted pursuant to § 12.102–5 of this chapter.

(c) *Cash bonuses and incentive compensation.* Incentive compensation for management employees, cash bonuses, suggestion awards, safety awards, and incentive compensation based on production, cost reduction, or efficient performance, are allowable to the extent that the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to an agreement entered into in good faith between the contractor and the employees before the services were rendered, or pursuant to an established plan followed by the contractor so consistently as to imply, in effect, an agreement to make such payment. (But see § 15.107.) Bonuses, awards, and incentive compensation when any of them are deferred are allowable to the extent provided in (f) below.

(d) *Bonuses and incentive compensation paid in stock.* Costs of bonuses and incentive compensation paid in the stock of the contractor or of an affiliate are allowable to the extent set forth in paragraph (c) of this section (including the incorporation of the principles of paragraph (f) of this section for deferred bonuses and incentive compensation), subject to the following additional requirements:

(1) Valuation placed on the stock transferred shall be the fair market value at the time of transfer, determined upon the most objective basis available; and

(2) Accruals for the cost of stock prior to the issuance of such stock to the employees shall be subject to adjustment according to the possibilities that the employees will not receive such stock and their interest in the accruals will be forfeited.

Such costs otherwise allowable are subject to adjustment according to the principles set forth in paragraph (f)(3) of this section. (But see § 15.107.)

(e) *Stock options.* The cost of options to employees to purchase stock of the contractor or of an affiliate is unallowable.

(f) *Deferred compensation.* (1) As used herein, deferred compensation includes all remuneration, in whatever form, for which the employee is not paid until after the lapse of a stated period of years or the occurrence of other events as provided in the plans, except that it does not include normal end of accounting period accruals. It includes (i) contributions to pension, annuity, stock bonus, and profit sharing plans, (ii) contributions to disability, withdrawal, insurance, survivorship, and similar benefit plans, and (iii) other deferred compensation, whether paid in cash or in stock.

(2) Deferred compensation is allowable to the extent that (i) except for past service pension and retirement costs, it is for services rendered during the contract period; (ii) it is, together with all other compensation paid to the employee, reasonable in amount; (iii) it is paid pursuant to an agreement entered into in good faith between the contractor and employees before the services are rendered, or pursuant to an established plan followed by the contractor so consistently as to imply, in effect, an agreement to make such payments; and (iv) for a plan which is subject to approval by the Internal Revenue Service, it falls within the criteria and standards of the Internal Revenue Code and the regulations of the Internal Revenue Service. (But see § 15.107.)

(3) In determining the cost of deferred compensation allowable under the contract, appropriate adjustments shall be made for credits or gains, including those arising out of both normal and abnormal employee turnover, or any other contingencies that can result in a forfeiture by employees of such deferred compensation. Adjustments shall be made only for forfeitures which directly or indirectly inure to the benefit of the contractor; forfeitures which inure to the benefit of other employees covered by a deferred compensation plan with no reduction in the contractor's costs will not normally give rise to adjustment in contract costs. Adjustments for normal employee turnover shall be based on the contractor's experience and on foreseeable prospects, and shall be reflected in the amount of cost currently allowable. Such adjustments will be unnecessary to the extent that the contractor can demonstrate that its contributions take into account normal forfeitures. Adjustments for possible future abnormal forfeitures shall be effected according to the following rules:

(i) Abnormal forfeitures that are foreseeable and which can be currently evaluated with reasonable accuracy, by actuarial or other sound computation, shall be reflected by an adjustment of current costs otherwise allowable; and

(ii) Abnormal forfeitures, not within (i) above, may be made the subject of agreement between the Government and the contractor either as to an equitable adjustment or a method of determining such adjustment.

(4) In determining whether deferred compensation is for services rendered during the contract period or is for future services, consideration shall be given to conditions imposed upon eventual payment, such as, requirements of continued employment, consultation after retirement, and covenants not to compete.

(g) *Fringe benefits.* Fringe benefits are allowances and services provided by the contractor to its employees as compensation in addition to regular wages and salaries. Costs of fringe benefits, such as pay for vacations, holidays, sick leave, military leave, employee insurance, and supplemental employment benefit plans are allowable to the extent required by law, employer-employee agreement, or an established policy of the contractor.

(h) *Severance pay.* See § 15.205–39.

(i) *Training and education expenses.* See § 15.205–44.

§ 15.205–7 Contingencies.

(a) A contingency is a possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminable at a present time.

(b) In historical costing, contingencies are not normally present since such costing deals with costs which have been incurred and recorded on the contractor's

books. Accordingly, contingencies are generally unallowable for historical costing purposes. However, in some cases, as for example, terminations, a contingency factor may be recognized which is applicable to a past period to give recognition to minor unsettled factors in the interest of expeditious settlement.

(c) In connection with estimates of future costs, contingencies fall into two categories:

(1) Those which may arise from presently known and existing conditions, the effects of which are foreseeable within reasonable limits of accuracy; *e.g.*, anticipated costs of rejects and defective work; in such situations where they exist, contingencies of this category are to be included in the estimates of future cost so as to provide the best estimate of performance costs; and

(2) Those which may arise from presently known or unknown conditions, the effect of which cannot be measured so precisely as to provide equitable results to the contractor and to the Government; *e.g.*, results of pending litigation, and other general business risks. Contingencies of this category are to be excluded from cost estimates under the several items of cost, but should be disclosed separately, including the basis upon which the contingency is computed in order to facilitate the negotiation of appropriate contractual coverage (see, for example, §§ 15.205–16, 15.205–20, and 15.205–39).

§ 15.205–8 Contributions and donations.

Contributions and donations are unallowable.

§ 15.205–9 Depreciation.

(a) Depreciation is a charge to current operations which distributes the cost of a tangible capital asset, less estimated residual value, over the estimated useful life of the asset in a systematic and logical manner. It does not involve a process of valuation. Useful life has reference to the prospective period of economic usefulness in the particular contractor's operations as distinguished from physical life.

(b) Normal depreciation on a contractor's plant, equipment, and other capital facilities is an allowable element of contract cost: *Provided*, That the amount thereof is computed:

(1) Upon the property cost basis used by the contractor for Federal income tax purposes (see section 167 of the Internal Revenue Code of 1954); or

(2) In the case of nonprofit or tax-exempt organizations, upon a property cost basis which could have been used by the contractor for Federal income tax purposes, had such organizations been subject to the payment of income tax; and in either case

(3) By the consistent application to the assets concerned of any generally accepted accounting method, and subject to the limitations of the Internal Revenue Code of 1954, as amended, including—

(i) The straight line method;

(ii) The declining balance method, using a rate not exceeding twice the rate which would have been used had the annual allowance been computed under the method described in subdivision (i) of this paragraph;

(iii) The sum of the years-digits method; and

(iv) Any other consistent method productive of an annual allowance which, when added to all allowances for the period commencing with the use of the property and including the current year, does not, during the first two-thirds of the useful life of the property, exceed the total of such allowances which would have been used had such allowances been computed under the method described in subdivision (ii) of this subparagraph.

(c) Depreciation should usually be allocated to the contract and other work as an indirect cost. The amount of depreciation allowed in any accounting period may, consistent with the basic objectives set forth in paragraph (a) of this section, vary with volume of production or use of multi-shift operations.

(d) In the case of emergency facilities covered by certificates of necessity a contractor may elect to use normal depreciation without requesting a determination of "true depreciation" or may elect to use either normal or "true depreciation" after a determination of "true depreciation" has been made by an Emergency Facilities Depreciation Board. The method elected must be followed consistently throughout the life of the emergency facility. Where an election is made to use normal depreciation, the amount thereof for both the emergency period and the post-emergency period shall be computed in accordance with paragraph (b) of this section. Where an election is made to use "true depreciation," the amount allowable as depreciation:

(1) With respect to the emergency period (5 years), shall be computed in accordance with the determination of the Emergency Facilities Depreciation Board and allocated rateably over the full five year emergency period; provided no other allowance is made which would duplicate the factors, such as extraordinary obsolescence, covered by the Board's determination; and

(2) After the end of the emergency period, shall be computed by distributing the remaining undepreciated portion of the cost of the emergency facility over the balance of its useful life (but see paragraph (e) of this section); provided the remaining undepreciated portion of such cost shall not include any amount of unrecovered "true depreciation."

(e) Depreciation on idle or excess facilities shall not be allowed except on such facilities as are reasonably necessary for standby purposes.

(f) No depreciation, rental, or use charge shall be allowed on the contractor's assets which have been fully depreciated when a substantial portion of such depreciation was on a basis that represented, in effect, a recovery thereof as a charge against Government contracts or subcontracts. Otherwise, a reasonable use charge may be agreed upon and allowed. (But see § 15.107.) In determining this charge, consideration should be given to cost, total estimated useful life at time of negotiation, and effect of any increased maintenance charges or decreased efficiency due to age.

§ 15.205–10 Employee morale, health, and welfare costs and credits.

Reasonable costs of health and welfare activities, such as house publications, health or first-aid clinics, recreational activities, and employee counseling services, incurred, in accordance with the contractor's established practice or custom in the industry or area, for the improvement of working conditions, employer-employee relations, employee morale, and employee performance, are allowable. Income generated from any of these activities shall be credited to the costs thereof unless such income has been irrevocably set over to employee welfare organizations.

§ 15.205–11 Entertainment costs.

Costs of amusement, diversion, social activities and incidental costs relating thereto, such as meals, lodging, rentals, transportation, and gratuities, are unallowable (but see §§ 15.205–10 and 15.205–43).

§ 15.205–12 Excess facility costs.

Costs of maintaining, repairing, and housing idle and excess contractor-owned facilities, except those reasonably necessary for standby purposes, are unallowable. Any costs of excess plant capacity reserved for defense mobilization production which are to be paid for by the Government should be the subject of a separate contract.

§ 15.205–13 Fines and penalties.

Costs of fines and penalties resulting from violations of, or failure of the contractor to comply with, Federal, State and local laws and regulations are unallowable except when incurred as a result of compliance with specific provisions of the contract, or instructions in writing from the contracting officer.

§ 15.205–14 Food service and dormitory costs and credits.

Food and dormitory services include operating or furnishing facilities for cafeterias, dining rooms, canteens, lunch wagons, vending machines, living accommodations or similar types of services for the contractor's employees at or near the contractor's facilities. Reasonable losses from the operation of such services are allowable if they are allocated to all activities served. Profits (except profits irrevocably set over to an employee welfare organization of the contractor in amounts reasonably useful for the benefit of the employees at the site or sites of contract performance) accruing to the contractor from the operation of these services, whether operated by the contractor or by a concessionaire, shall be treated as a credit, and allocated to all activities served.

§ 15.205–15 Fringe benefits.

(See § 15.205–6(g).)

§ 15.205–16 Insurance and indemnification.

(a) Insurance includes insurance which the contractor is required to carry, or which is approved, under the terms of

the contract, and any other insurance which the contractor maintains in connection with the general conduct of his business.

(1) Costs of insurance required or approved, and maintained, pursuant to the contract, are allowable.

(2) Costs of other insurance maintained by the contractor in connection with the general conduct of his business are allowable subject to the following limitations:

(i) Types and extent of coverage shall be in accordance with sound business practice and the rates and premiums shall be reasonable under the circumstances;

(ii) Costs allowed for business interruption or other similar insurance shall be limited to exclude coverage of profit;

(iii) Costs of insurance or of any provision for a reserve covering the risk of loss of or damage to Government property are allowable only to the extent that the contractor is liable for such loss or damage and such insurance or reserve does not cover loss or damage which results from willful misconduct or lack of good faith on the part of any of the contractor's directors or officers, or other equivalent representatives, who has supervision or direction of (*a*) all or substantially all of the contractor's business, or (*b*) all or substantially all of the contractor's operations at any one plant or separate location in which the contract is being performed, or (*c*) a separate and complete industrial operation in connection with the performance of the contract;

(iv) Provisions for a reserve under an approved self-insurance program are allowable to the extent that the types of coverage, extent of coverage, and the rates and premiums would have been allowed had insurance been purchased to cover the risks; and

(v) Costs of insurance on the lives of officers, partners, or proprietors are allowable only to the extent that the insurance represents additional compensation (see § 15.205–6).

(3) Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or otherwise) are unallowable unless expressly provided for in the contract, except:

(i) Costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound business practice, are allowable; and

(ii) Minor losses not covered by insurance, such as spoilage, breakage, and disappearance of small hand tools, which occur in the ordinary course of doing business, are allowable.

(b) Indemnification includes securing the contractor against liabilities to third persons and any other loss or damage, not compensated by insurance or otherwise. The Government is obligated to indemnify the contractor only to the extent expressly provided for in the contract, except as provided in paragraph (a)(3) of this section.

§ 15.205–17 Interest and other financial costs.

Interest on borrowings (however represented), bond discounts, costs of financing and refinancing operations, legal and professional fees paid in connection with the preparation of prospectuses, costs of preparation and issuance of stock rights, and costs related thereto, are unallowable except for interest assessed by State or local taxing authorities under the conditions set forth in § 15.205–41. (But see § 15.205–24.)

§ 15.205–18 Labor relations costs.

Costs incurred in maintaining satisfactory relations between the contractor and its employees, including costs of shop stewards, labor management committees, employee publications, and other related activities, are allowable.

§ 15.205–19 Losses on other contracts.

An excess of costs over income under any other contract (including the contractor's contributed portion under cost-sharing contracts), whether such other contract is of a supply, research and development, or other nature, is unallowable.

§ 15.205–20 Maintenance and repair costs.

(a) Costs necessary for the upkeep of property (including Government property unless otherwise provided for), which neither add to the permanent value of the property nor appreciably prolong its intended life, but keep it in an efficient operating condition, are to be treated as follows (but see § 15.205–9):

(1) Normal maintenance and repair costs are allowable;

(2) Extraordinary maintenance and repair costs are allowable, provided such are allocated to the periods to which applicable for purposes of determining contract costs. (But see § 15.107.)

(b) Expenditures for plant and equipment, including rehabilitation thereof, which, according to generally accepted accounting principles as applied under the contractor's established policy, should be capitalized and subjected to depreciation, are allowable only on a depreciation basis.

§ 15.205–21 Manufacturing and production engineering costs.

Costs of manufacturing and production engineering, including engineering activities in connection with the following, are allowable:

(a) Current manufacturing processes such as motion and time study, methods analysis, job analysis, and tool design and improvement; and

(b) Current production problems, such as materials analysis for production suitability and component design for purposes of simplifying production.

§ 15.205–22 Material costs.

(a) Material costs include the costs of such items as raw materials, parts, subassemblies, components, and manufacturing supplies, whether purchased outside or manufactured by the contractor, and may include such collateral items as inbound transportation and intransit insurance. In computing material costs consideration will be given to reasonable overruns, spoilage, or defective work (concerning correction of defective work, see the provisions of the contract relating to inspection and correction of defective work). These costs are allowable subject, however, to the provisions of paragraphs (b) through (e) of this section.

(b) Costs of material shall be suitably adjusted for applicable portions of income and other credits, including available trade discounts, refunds, rebates, allowances, and cash discounts, and credits for scrap and salvage and material returned to vendors. Such income and other credits shall either be credited directly to the cost of the material involved or be allocated (as credits) to indirect costs. However, where the contractor can demonstrate that failure to take cash discounts was due to reasonable circumstances, such lost discounts need not be so credited.

(c) Reasonable adjustments arising from differences between periodic physical inventories and book inventories may be included in arriving at costs, provided such adjustments relate to the period of performance of the contract.

(d) When the materials are purchased specifically for and identifiable solely with performance under a contract, the actual purchase cost thereof should be charged to the contract. If material is issued from stores, any generally recognized method of pricing such material is acceptable if that method is consistently applied and the results are equitable. When estimates of material costs to be incurred in the future are required, either current market price or anticipated acquisition cost may be used, but the basis of pricing must be disclosed.

(e) Charges for materials, services, and supplies sold or transferred between plants, divisions or organizations, under a common control, ordinarily shall be allowable to the extent of the lower of cost to the transferor or current market price. However, a departure from this basis is permissible where (1) the item is regularly manufactured and sold by the contractor through commercial channels, and (2) it is the contractor's long-established practice to price interorganization transfers at other than cost for commercial work: *Provided*, That the charge to the contract is not in excess of the transferor's sales price to its most favored customer for the same item in like quantity, or the current market price, whichever is lower.

§ 15.205–23 Organization costs.

Expenditures, such as incorporation fees, attorneys' fees, accountants' fees, brokers' fees, fees to promoters and organizers, in connection with (a) organization or reorganization of a business, or (b) raising capital, are unallowable.

§ 15.205–24 Other business expenses.

Included in this item are such recurring expenses as registry and transfer charges resulting from changes in ownership of securities issued by the contractor, cost of shareholders' meetings, normal proxy solicitations, preparation and publication of reports to shareholders, preparation and submission of required reports and forms to taxing and other regulatory bodies; and incidental

costs of directors and committee meetings. The above and similar costs are allowable when allocated on an equitable basis.

§ 15.205–25 Overtime, extra-pay shift and multi-shift premiums.

Premiums for overtime, extra-pay shifts, and multi-shift work are allowable to the extent approved pursuant to § 12.102–4 of this chapter, or permitted pursuant to § 12.102–5 of this chapter.

§ 15.205–26 Patent costs.

Costs of preparing disclosures, reports, and other documents required by the contract and of searching the art to the extent necessary to make such invention disclosures, are allowable. In accordance with the clauses of the contract relating to patents, costs of preparing documents and any other patent costs, in connection with the filing of a patent application where title is conveyed to the Government, are allowable. (See § 15.205–36.)

§ 15.205–27 Pension plans.

See § 15.205–6.

§ 15.205–28 Plant protection costs.

Costs of items such as (a) wages, uniforms, and equipment of personnel engaged in plant protection, (b) depreciation on plant protection capital assets, and (c) necessary expenses to comply with military security requirements, are allowable.

§ 15.205–29 Plant reconversion costs.

Plant reconversion costs are those incurred in the restoration or rehabilitation of the contractor's facilities to approximately the same condition existing immediately prior to the commencement of the military contract work, fair wear and tear excepted. Reconversion costs are unallowable except for the cost of removing Government property and the restoration or rehabilitation costs caused by such removal. However, in special circumstances where equity so dictates, additional costs may be allowed to the extent agreed upon before the costs are incurred. Whenever such costs are given consideration, care should be exercised to avoid duplication through allowance as contingencies, as additional profit or fee, or in other contracts.

§ 15.205–30 Precontract costs.

Precontract costs are those incurred prior to the effective date of the contract directly pursuant to the negotiation and in anticipation of the award of the contract where such incurrence is necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract (but see § 15.107).

§ 15.205–31 Professional service costs; legal, accounting, engineering, and other.

(a) Costs of professional services rendered by the members of a particular profession who are not employees of the contractor are allowable, subject to paragraphs (b) and (c) of this section, when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government (but see § 15.205–23).

(b) Factors to be considered in determining the allowability of costs in a particular case include:

(1) The past pattern of such costs, particularly in the years prior to the award of Government contracts;

(2) The impact of Government contracts on the contractor's business (i.e., what new problems have arisen);

(3) The nature and scope of managerial services expected of the contractor's own organizations; and

(4) Whether the proportion of Government work to the contractor's total business is such as to influence the contractor in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under Government contracts.

Retainer fees to be allowable must be reasonably supported by evidence of bona fide services available or rendered.

(c) Costs of legal, accounting, and consulting services, and related costs, incurred in connection with organization and reorganization, defense of antitrust suits, and the prosecution of claims against the Government, are unallowable. Costs of legal, accounting, and consulting services, and related costs, incurred in connection with patent infringement litigation, are unallowable unless otherwise provided for in the contract.

§ 15.205–32 Profits and losses on disposition of plant, equipment, or other capital assets.

Profits or losses of any nature arising from the sale or exchange of plant, equipment, or other capital assets, including sale or exchange of either short or long term investments, shall be excluded in computing contract costs (but see § 15.205–9(b) as to basis for depreciation).

§ 15.205–33 Recruiting costs.

Costs of "help wanted" advertising, operating costs of an employment office necessary to secure and maintain an adequate labor force, costs of operating an aptitude and educational testing program, travel costs of employees while engaged in recruiting personnel, and travel costs of applicants for interviews for prospective employment are allowable. Where the contractor uses employment agencies, costs not in excess of standard commercial rates for such services are also allowable. Costs of special benefits or emoluments offered to prospective employees beyond the standard practices in the industry are unallowable.

§ 15.205–34 Rental costs (including sale and leaseback of facilities).

(a) Rental costs of land, building, and equipment and other personal property are allowable if the rates are reasonable in light of such factors as rental costs of comparable facilities and market conditions in the area, the type, life expectancy, condition, and value of the facilities leased, options available, and other provisions of the rental agreement. Application of these factors, in situations where rentals are extensively used, may involve among other considerations, comparison of rental costs with the amount which the contractor would have received had it owned the facilities.

(b) Charges in the nature of rent between plants, divisions, or organizations under common control are allowable to the extent such charges do not exceed the normal costs of ownership, such as depreciation, taxes, insurance, and maintenance: *Provided*, That no part of such costs shall duplicate any other allowed cost.

(c) Unless otherwise specifically provided in the contract, rental costs specified in sale and leaseback agreements, incurred by contractors through selling plant facilities to investment organizations, such as insurance companies, or to private investors, and concurrently leasing back the same facilities, are allowable only to the extent that such rentals do not exceed the amount which the contractor would have received had it retained legal title to the facilities.

(d) The allowability of rental costs under unexpired leases in connection with terminations is treated in § 15.205–42(e).

§ 15.205–35 Research and development costs.

(a) Basic research, for the purpose of this subpart, is that type of research which is directed toward increase of knowledge in science. In such research, the primary aim of the investigator is a fuller knowledge or understanding of the subject under study, rather than any practical application thereof. Applied research, for the purpose of this subpart, consists of that type of effort which (1) normally follows basic research, but may not be severable from the related basic research (2) attempts to determine and expand the potentialities of new scientific discoveries or improvements in technology, materials, processes, methods, devices, and techniques, and (3) attempts to "advance the state of the art." Applied research does not include any such efforts when their principal aim is the design, development, or test of specific articles or services to be offered for sale, which are within the definition of the term development as hereinafter provided.

(b) Development is the systematic use of scientific knowledge which is directed toward the production of, or improvements in, useful products to meet specific performance requirements, but exclusive of manufacturing and production engineering.

(c) A contractor's independent research and development is that research and development which is not sponsored by a contract, grant, or other arrangement.

(d) A contractor's costs of independent research as defined in paragraphs (a) and (c) of this section shall be allowable as indirect costs (subject to paragraph (h) of this section), provided they are allocated to all work of the contractor.

(e) Costs of contractor's independent development, as defined in paragraphs (b) and (c) of this section (subject to

paragraph (h) of this section), are allowable to the extent that such development is related to the product lines for which the Government has contracts, provided the costs are reasonable in amount and are allocated as indirect costs to all work of the contractor on such product lines. In cases where a contractor's normal course of business does not involve production work, the cost of independent development is allowable to the extent that such development is related and allocated as an indirect cost to the field of effort of Government research and development contracts.

(f) Independent research and development costs shall include an amount for the absorption of their appropriate share of indirect and administrative costs, unless the contractor, in accordance with its accounting practices consistently applied, treats such costs otherwise.

(g) Research and development costs (including amounts capitalized), regardless of their nature, which were incurred in accounting periods prior to the award of a particular contract, are unallowable except where allowable as precontract costs (see § 15.205–30).

(h) The reasonableness of expenditures for independent research and development should be determined in light of all pertinent considerations such as previous contractor research and development activity, cost of past programs and changes in science and technology. Such expenditures should be pursuant to a broad planned program, which is reasonable in scope and well managed. Such expenditures (especially for development) should be scrutinized with great care in connection with contractors whose work is predominantly or substantially with the Government. Advance agreements as described in § 15.107 are particularly important in this situation. In recognition that cost sharing of the contractor's independent research and development program may provide motivation for more efficient accomplishment of such program, it is desirable in some cases that the Government bear less than an allocable share of the total cost of the program. Under these circumstances, the following are among the approaches which may be used as the basis for agreement: (1) review of the contractor's proposed independent research and development program and agreement to accept the allocable costs of specific projects; (2) agreement on a maximum dollar limitation of costs, an allocable portion of which will be accepted by the Government; (3) an agreement to accept the allocable share of a percentage of the contractor's planned research and development program.

§ 15.205–36 Royalties and other costs for use of patents.

(a) Royalties on a patent or amortization of the cost of acquiring by purchase a patent or rights thereto, necessary for the proper performance of the contract and applicable to contract products or processes, are allowable unless:

(1) The Government has a license or the right to free use of the patent;

(2) The patent has been adjudicated to be invalid, or has been administratively determined to be invalid;

(3) The patent is considered to be unenforceable; or

(4) The patent is expired.

(b) Special care should be exercised in determining reasonableness where the royalties may have been arrived at as a result of less than arm's length bargaining; e.g.:

(1) Royalties paid to persons, including corporations, affiliated with the contractor;

(2) Royalties paid to unaffiliated parties, including corporations, under an agreement entered into in contemplation that a Government contract would be awarded; or

(3) Royalties paid under an agreement entered into after the award of the contract.

(c) In any case involving a patent formerly owned by the contractor, the amount of royalty allowed should not exceed the cost which would have been allowed had the contractor retained title thereto.

(d) See § 15.107, regarding advance understandings.

§ 15.205–37 Selling costs.

(a) Selling costs arise in the marketing of the contractor's products and include costs of sales promotions, negotiation, liaison between Government representatives and contractor's personnel, and other related activities.

(b) Selling costs are allowable to the extent they are reasonable and are allocable to Government business (but see §§ 15.107 and 15.205–1). Allocability of selling costs will be determined in the light of reasonable benefit to the Government arising from such activities as technical, consulting, demonstration, and other services which are for purposes such as application or adaptation of the contractor's products to Government use.

(c) Notwithstanding paragraph (b) of this section, salesmen's or agents' compensation, fees, commissions, percentages, or brokerage fees, which are contingent upon the award of contracts, are allowable only when paid to bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

§ 15.205–38 Service and warranty costs.

Such costs include those arising from fulfillment of any contractual obligation of a contractor to provide services, such as installation, training, correcting defects in the products, replacing defective parts, making refunds in the case of inadequate performance, etc. When not inconsistent with the terms of the contract, such service and warranty costs are allowable. However, care should be exercised to avoid duplication of the allowance as an element of both estimated product cost and risk.

§ 15.205–39 Severance pay.

(a) Severance pay, also commonly referred to as dismissal wages, is a payment in addition to regular salaries and wages, by contractors to workers whose employment is being terminated. Costs of severance pay are allowable only to the extent that, in each case, it is required by (1) law, (2) employer-employee agreement, (3) established policy that constitutes, in effect, an implied agreement on the contractor's part, or (4) circumstance of the particular employment.

(b) Costs of severance payments are divided into two categories as follows:

(1) Actual normal turnover severance payments shall be allocated to all work performed in the contractor's plant; or, where the contractor provides for accrual of pay for normal severances such method will be acceptable if the amount of the accrual is reasonable in light of payments actually made for normal severances over a representative past period, and if amounts accrued are allocated to all work performed in the contractor's plant; and

(2) Abnormal or mass severance pay is of such a conjectural nature that measurement of costs by means of an accrual will not achieve equity to both parties. Thus accruals for this purpose are not allowable. However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment. Thus, allowability will be considered on a case-by-case basis in the event of occurrence.

§ 15.205–40 Special tooling costs.

The term "special tooling" means all jigs, dies, fixtures, molds, patterns, special taps, special gauges, special test equipment, other special equipment and manufacturing aids, and replacements thereof, acquired or manufactured by the contractor for use in the performance of a contract, which are of such a specialized nature that, without substantial modification or alteration, their use is limited to the production of such supplies or parts thereof, or the performance of such services, as are peculiar to the needs of the Government. The term does not include: (1) Items of tooling or equipment acquired by the contractor prior to the contract, or replacements thereof, whether or not altered or adapted for use in the performance of the contract, (2) consumable small tools, or (3) general or special machine tools, or similar capital items. The cost of special tooling, when acquired for and its usefulness is limited to one or more Government contracts, is allowable and shall be allocated to the specific Government contract or contracts for which acquired.

§ 15.205–41 Taxes.

(a) Taxes are charges levied by Federal, State, or local governments. They do not include fines and penalties except as otherwise provided herein. In general, taxes (including State and local income taxes) which the contractor is required to pay and which are paid or accrued in accordance with generally accepted accounting principles, are allowable, except for:

(1) Federal income and excess profits taxes;

(2) Taxes in connection with financing, refinancing or refunding operations (see § 15.205–17);

(3) Taxes from which exemptions are available to the contractor directly or available to the contractor based on an exemption afforded the Government except when the contracting officer determines that the administrative burden incident to obtaining the exemption outweighs the corresponding benefits accruing to the Government; and

(4) Special assessments on land which represent capital improvements.

(b) Taxes otherwise allowable under paragraph (a) of this section, but upon which a claim of illegality or erroneous assessment exists, are allowable: *Provided,* That the contractor prior to payment of such taxes:

(1) Promptly requests instructions from the contracting officer concerning such taxes; and

(2) Takes all action directed by the contracting officer arising out of subparagraph (1) of this paragraph or an independent decision of the Government as to the existence of a claim of illegality or erroneous assessment, including cooperation with and for the benefit of the Government to (i) determine the legality of such assessment or, (ii) secure a refund of such taxes.

Reasonable costs of any such action undertaken by the contractor at the direction or with the concurrence of the contracting officer are allowable. Interest and penalties incurred by a contractor by reason of the nonpayment of any tax at the direction of the contracting officer or by reason of the failure of the contracting officer to assure timely direction after prompt request therefor, are also allowable.

(c) Any refund of taxes, interest, or penalties, and any payment to the contractor of interest thereon, attributable to taxes, interest, or penalties which were allowed as contract costs, shall be credited or paid to the Government in the manner directed by the Government, provided any interest actually paid or credited to a contractor incident to a refund of tax, interest or penalty shall be paid or credited to the Government only to the extent that such interest accrued over the period during which the contractor had been reimbursed by the Government for the taxes, interest or penalties.

§ 15.205–42 Termination costs.

Contract terminations generally give rise to the incurrence of costs, or the need for special treatment of costs, which would not have arisen had the contract not been terminated. Cost principles covering these items are set forth below. They are to be used in conjunction with the remainder of this subpart in termination situations.

(a) Common items: The cost of items reasonably usable on the contractor's other work shall not be allowable unless the contractor submits evidence that it could not retain such items at cost without sustaining a loss. In deciding whether such items are reasonably usable on other work of the contractor, the contracting officer should consider the contractor's plans and orders for current and scheduled production. Contemporaneous purchases of common items by the contractor shall be regarded as evidence that such items are reasonably usable on the contractor's other work. Any acceptance of common items as allocable to the terminated portion of the contract should be limited to the extent that the quantities of such items on hand, in transit, and on order are in excess of the reasonable quantitative requirements of other work.

(b) Costs continuing after termination: If, in a particular case, despite all reasonable efforts by the contractor, certain costs cannot be discontinued immediately after the effective date of termination, such costs are generally allowable within the limitations set forth in this subpart, except that any such costs continuing after termination due to the negligent or willful failure of the contractor to discontinue such costs shall be considered unallowable.

(c) Initial costs, including starting load and preparatory costs, are allowable, subject to the following:

(1) Starting load costs are costs of a non-recurring nature arising in the early stages of production and not fully absorbed because of the termination. Such costs may include the cost of labor and material, and related overhead attributable to such factors as—

(i) Excessive spoilage resulting from inexperienced labor,

(ii) Idle time and subnormal production occasioned by testing and changing methods of processing,

(iii) Employee training, and

(iv) Unfamiliarity or lack of experience with the product, materials, manufacturing processes and techniques.

(2) Preparatory costs are costs incurred in preparing to perform the terminated contract, including costs of initial plant rearrangement and alterations, management and personnel organization, production planning and similar activities, but excluding special machinery and equipment and starting load costs.

(3) If initial costs are claimed and have not been segregated on the contractor's books, segregation for settlement purposes shall be made from costs reports and schedules which reflect the high unit cost incurred during the early stages of the contract.

(4) When the settlement proposal is on the inventory basis, initial costs should normally be allocated on the basis of total end items called for by the contract immediately prior to termination; however, if the contract includes end items of a diverse nature, some other equitable basis may be used, such as machine or labor hours.

(5) When initial costs are included in the settlement proposal as a direct charge, such costs shall not also be included in overhead.

(6) Initial costs attributable to only one contract shall not be allocated to other contracts.

(d) Loss of useful value of special tooling, special machinery and equipment is generally allowable, provided—

(1) Such special tooling, machinery or equipment is not reasonably capable of use in the other work of the contractor;

(2) The interest of the Government is protected by transfer of title or by other means deemed appropriate by the contracting officer; and

(3) The loss of useful value as to any one terminated contract is limited to that portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the contract bears to the entire terminated contract and other Government contracts for which the special tooling, special machinery and equipment was acquired.

(e) Rental costs under unexpired leases are generally allowable where clearly shown to have been reasonably necessary for the performance of the terminated contract, less the residual value of such leases, if—

(1) The amount of such rental claimed does not exceed the reasonable use value of the property leased for the period of the contract and such further period as may be reasonable; and

(2) The contractor makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease.

There also may be included the cost of alterations of such leased property, provided, such alterations were necessary for the performance of the contract, and of reasonable restoration required by the provisions of the lease.

(f) Settlement expenses including the following are generally allowable:

(1) Accounting, legal, clerical, and similar costs reasonably necessary for—

(i) The preparation and presentation to contracting officers of settlement claims and supporting data with respect to the terminated portion of the contract, and

(ii) The termination and settlement of subcontracts; and

(2) Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.

(g) Subcontractor claims, including the allocable portion of claims which are common to the contract and to other work of the contractor are generally allowable.

§ 15.205–43 Trade, business, technical and professional activity costs.

(a) *Memberships.* This category includes costs of memberships in trade, business, technical, and professional organizations. Such costs are allowable.

(b) *Subscriptions.* This item includes cost of subscriptions to trade, business, professional, or technical periodicals. Such costs are allowable.

(c) *Meetings and conferences.* This item includes cost of meals, transportation, rental of facilities for meetings, and costs incidental thereto, when the primary purpose of the incurrence of such costs is the dissemination of technical information or stimulation of production. Such costs are allowable.

§ 15.205–44 Training and educational costs.

(a) Costs of preparation and maintenance of a program of instruction at non-college level, designed to increase

the vocational effectiveness of bona fide employees, including training materials, textbooks, salaries or wages of trainees (excluding overtime compensation which might arise therefrom), and

(1) Salaries of the director of training and staff when the training program is conducted by the contractor; or

(2) Tuition and fees when the training is in an institution not operated by the contractor;

are allowable.

(b) Costs of part-time education, at an under-graduate or post-graduate college level, related to the job requirements of bona fide employees, including only:

(1) Training materials;

(2) Textbooks;

(3) Fees charged by the educational institution;

(4) Tuition charged by the educational institution, or in lieu of tuition, instructors' salaries and the related share of indirect cost of the educational institution to the extent that the sum thereof is not in excess of the tuition which would have been paid to the participating educational institution; and

(5) Straight-time compensation of each employee for time spent attending classes during working hours not in excess of 156 hours per year where circumstances do not permit the operation of classes or attendance at classes after regular working hours;

are allowable.

(c) Costs of tuition, fees, training materials and textbooks (but not subsistence, salary, or any other emoluments) in connection with fulltime scientific and engineering education at a post-graduate (but not under-graduate) college level related to the job requirements of bona fide employees for a total period not to exceed one school year for each employee so trained, are allowable. In unusual cases where required by military technology, the period may be extended.

(d) Maintenance expense, and normal depreciation or fair rental, on facilities owned or leased by the contractor for training purposes are allowable to the extent set forth in §§ 15.205–20, 15.205–9, and 15.205–34, respectively.

(e) Grants to educational or training institutions, including the donation of facilities or other properties, scholarships or fellowships, are considered contributions and are unallowable.

§ 15.205–45 Transportation costs.

Transportation costs include freight, express, cartage, and postage charges relating either to goods purchased, in process, or delivered. These costs are allowable. When such costs can readily be identified with the items involved, they may be directly costed as transportation costs or added to the cost of such items (see § 15.205–22). Where identification with the materials received cannot readily be made, inbound transportation costs may be charged to the appropriate indirect cost accounts if the contractor follows a consistent, equitable procedure in this respect. Outbound freight, if reimbursable under the terms of the contract, shall be treated as a direct cost.

§ 15.205–46 Travel costs.

(a) Travel costs include costs of transportation, lodging, subsistence, and incidental expenses, incurred by contractor personnel in a travel status while on official company business.

(b) Travel costs may be based upon actual costs incurred, or on a per diem or mileage basis in lieu of actual costs, or on a combination of the two, provided the method used does not result in an unreasonable charge.

(c) Travel costs incurred in the normal course of over-all administration of the business are allowable and shall be treated as indirect costs.

(d) Travel costs directly attributable to specific contract performance are allowable and may be charged to the contract in accordance with the principle of direct costing (see § 15.202).

(e) Necessary, reasonable costs of family movements and personnel movements of a special or mass nature are allowable, subject to allocation on the basis of work or time period benefited when appropriate. (But see § 15.107.)

Subpart C—Research Contracts With Educational Institutions

§ 15.301 General.

(a) It is the intent of these principles to provide Department of Defense agencies and educational institutions with a common basis for determining the allowable costs of research sponsored by the Federal Government. Application of these principles should enable such agencies and institutions to identify the allowable direct costs of such research, plus the allocable portion of the allowable indirect costs, less applicable credits. The tests of allowability of costs applied in these principles are reasonableness and allocability under consistently applied generally accepted cost accounting principles and practices; however, these provisions are subject to any limitations as to types or amounts of costs set forth in the research agreement.

(b) These principles do not attempt to identify the circumstances or dictate the extent of agency and institution participation in the financing of a particular research and development project, but rather are confined to the subject of cost determination. Arrangements concerning financial participation are properly the subject of negotiation between the contracting officer and the educational institution concerned.

(c) These principles should be applied to all Department of Defense sponsored research at an educational institution, including research conducted at locations other than the main campus of the institution.

(d) A negotiated fixed amount in lieu of indirect costs may be appropriate in certain instances for off-campus or segregated research projects where (1) research agreements are charged directly for the cost of many of their administrative or housekeeping services, or (2) the cost of benefits derived from an institution's indirect services cannot be readily determined by use of apportionment or allocation bases normally employed, or (3) the costs of apportioning and allocating expenses to research agreements are excessive. The negotiated amount should not exceed a conservative estimate of anticipated indirect costs.

§ 15.302 Definitions.

As used in this subpart, the following terms have the meanings stated in §§ 15.302–1 to 15.302–6.

§ 15.302–1 Research agreements.

"Research agreements" are agreements to perform Federally sponsored research through grants, cost-reimbursement type contracts, cost-reimbursement type subcontracts, and fixed-price contracts and subcontracts for research.

§ 15.302–2 Apportionment.

"Apportionment" is the process by which the indirect costs of the institution are assigned to (a) instruction and research, and (b) other institutional activities.

§ 15.302–3 Allocation.

"Allocation" is the process by which the indirect costs apportioned to instruction and research are distributed to research agreements.

§ 15.302–4 Sponsoring agency.

"Sponsoring agency" means the Federal agency for which the institution is performing research. Its use in this document does not imply a change in concept or intent for those agencies that have traditionally used a grant rather than a contractual instrument.

§ 15.302–5 Original complement.

"Original complement" means the complement of equipment initially placed in buildings to perform the functions currently being performed in such buildings. If a permanent change in the function of a building takes place, a redetermination of the original complement of equipment may be made at that time to establish a new original complement.

§ 15.302–6 Other institutional activities.

"Other institutional activities" means all organized activities of an institution not directly related to the instruction and research functions, such as residence halls, dining halls, student hospitals, student unions, intercollegiate athletics, book stores, faculty housing, student apartments, guest houses, chapels, theaters, public museums, financial campaigns, and other similar activities or auxiliary enterprises. Also included under this definition is any category of cost treated as "unallowable," provided such category of cost identifies a function or activity to which a portion of the institution's general overhead expenses are properly allocable.

§ 15.303 Direct costs.

Direct costs are those identified as having been specifically incurred to perform a particular research agreement. The general types of direct costs are:

(a) "Direct salaries and wages", including employee benefit expenses and pension plan costs (see § 15.307) to the extent that they are consistently treated by the educational institution as a direct rather than an indirect cost, are those applicable directly to the performance of

a research agreement. Such salaries and wages should be charged at the actual rates paid by the institution. Where professional staff paid on a salary basis work directly part time on a research agreement, current and reasonable estimates of time spent may be used in the absence of actual time records;

(b) "Direct material costs" include raw materials, purchased or supplied from stock, which are directly consumed or expended in the performance of a research agreement, or are otherwise applicable directly to a research agreement; and

(c) "Other direct costs" include other expenses related directly to a particular research agreement or project, including abnormal utility consumption. This may include services purchased from institution service operations, provided such are consistently treated as direct rather than indirect costs and are priced under a recognized method of costing or pricing designed to recover only actual costs and conforming to generally accepted cost accounting practices consistently followed by the institution. Purchases of equipment will be included under this heading only to the extent expressly provided for in the research agreement or approved pursuant to such agreement.

§ 15.304 Indirect costs.

Indirect costs are those which, because of their incurrence for common or joint objectives, are not readily subject to treatment as direct costs of research agreements or other activities. The general types of indirect costs are:

(a) "General administration and general expenses" are those incurred for the general executive and administrative offices of educational institutions and other expenses of a general character which do not relate solely to any specific division of the institution. Employee benefit expenses and pension plan costs may be included in this category to the extent that they are consistently treated by the educational institution as an indirect rather than a direct cost;

(b) "Research administration expenses" are those which apply to research administered in whole or in part by a separate organization or an identifiable administrative unit. Examples of work relating to research which is sometimes performed under such organizational arrangement are: contract administration, security, purchasing, personnel administration, and editing and publishing of research data;

(c) "Operation and maintenance expenses" are those incurred for operating and maintaining the institution's physical plant. They include expenses normally incurred by the institution for administration or supervision of the physical plant; janitorial service; repairs and ordinary or normal alterations of buildings, furniture and equipment; care and maintenance of grounds; utilities; and other expenses customarily associated with the operation, maintenance, preservation and protection of the physical plant;

(d) "Library expenses" are those incurred for direct operation of the library plus a use allowance for library books. The use allowance shall not exceed eight cents per volume per year;

(e) "Use allowance" is a means of compensation for the use of buildings, capital improvements, and equipment over and above the expenses for operation and maintenance when depreciation or other equivalent costs are not considered. The use allowance for buildings and improvements shall be computed at an annual rate not to exceed two percent (2%) of acquisition cost. The use allowance for equipment shall be computed at an annual rate not exceeding six and two-thirds percent (6⅔%) of acquisition cost of usable equipment in those cases where the institution maintains current records with respect to such equipment on hand. Where the institution's records reflect only the cost (actual or estimated) of the original complement of equipment, the use allowance shall be computed at an annual rate not exceeding ten percent (10%) of such cost. In those cases where no equipment records are maintained, the institution will justify a reasonable estimate of the acquisition cost of usable equipment which may be used to compute the use allowance at an annual rate not exceeding six and two-thirds percent (6⅔%) of such estimate. Computation of the use allowance shall exclude the portion of the cost of buildings and equipment paid for out of Federal funds and the cost of grounds; and

(f) "Indirect department expenses" are those incurred for departmental administration, such as salaries of deans or heads of colleges, schools, departments or divisions, and related secretarial and other administrative expenses.

§ 15.305 Applicable costs.

(a) The cost of a research agreement is comprised of the allowable direct costs incident to its performance, plus the allocable portion of the allowable indirect costs of the institution, less applicable credits.

(b) When any types of expense ordinarily treated as indirect costs are charged to a research agreement as direct costs, the costs of similar items applicable to other activities of the institution must be eliminated from indirect costs allocable to the research agreement.

(c) Where a particular understanding has been reached regarding specific items of cost to be reimbursed, the research agreement should clearly state such understanding.

(d) Section 15.307 provides standards to be applied in determining the allowability of certain items of cost and also identifies certain types of expenditures which relate solely to instruction and therefore do not enter into the costs of research agreements, either as direct costs or indirect costs; such costs of instruction shall be excluded from the computations provided herein.

§ 15.306 Determination of indirect costs.

§ 15.306–1 General.

(a) In determining the indirect costs applicable to Federally sponsored research agreements, the allowable indirect costs should first be apportioned equitably between (1) instruction and research activity and (2) other institutional activities, as provided in § 15.306–2.

(b) The amounts of indirect costs apportioned to instruction and research should then be allocated in an equitable manner to research agreements, as provided in § 15.306–3.

(c) Actual conditions must be taken into account in determining the most suitable method or methods to be used in the apportionment and allocation of indirect costs. The objective should be the selection of a method or methods which will distribute the indirect costs in a fair and equitable manner to the Government research and development work and other work of the institution, giving due consideration to the nature and extent of the use of the institution's facilities by research personnel, academic staff, students and other personnel or activities, and to the materiality of the amounts involved. The methods used should conform with generally accepted cost accounting practices, provide uniformity of treatment for like cost elements, be applied consistently, and produce equitable results. Any significant change, such as in the nature or extent of Government work or other activities sponsored or conducted by the institution, may require reconsideration of the methods previously in use to determine whether they continue to be equitable.

§ 15.306–2 Apportionment.

Where indirect costs relate to research, instruction, and other activities, such indirect costs shall be apportioned as between instruction and research activities, and other institutional activities as defined in § 15.302–6. The apportionment shall be made as follows:

(a) General administration and general expenses, on the basis of total expenditures: if more appropriate in the circumstances, however, other bases may be used;

(b) Operation and maintenance of the physical plant, if not separately costed, on the basis of total square or cubic footage of the buildings; and

(c) Other types of indirect costs normally do not require apportionment, where they do, an equitable basis for making the apportionment should be selected.

§ 15.306–3 Allocation.

(a) After determination of the total amount of indirect costs applicable to instruction and research activities, such indirect costs shall in turn be allocated between instruction activities and research agreements as described in paragraphs (b), (c), (d), and (e) of this section.

(b) The following criteria should be used with such appropriate modifications as will under the circumstances produce reasonably equitable allocation of the indirect costs associated with research agreements:

(1) "General administration and general expenses" should normally be allocated on the basis of total expenditures (exclusive of capital expenditures and use allowances) if equitable, direct sal-

aries and wages, or other bases appropriate in the circumstances;

(2) "Research administration expenses" should be allocated to (i) applicable research agreements and (ii) other research benefiting therefrom on the basis of records reflecting the proportion fairly applicable to each or, in the absence of such records, on the basis of a reasonable estimate;

(3) "Operation and maintenance expenses" should be allocated on a basis that gives primary emphasis to space utilization. The amount allocated may be developed as follows:

(i) Where actual space and related cost records are or can readily be maintained without significant change in the accounting practices, the amount allocated to research agreements should be based on such data;

(ii) Where the space and related cost records maintained are not sufficient for purposes of subdivision (i) of this subparagraph, a reasonable estimate of the proportion of total space assigned to research agreements normally will suffice, and this proportion of operation and maintenance expense should be allocated to research agreements. Where it can be established that the cost of maintaining space assigned to research varies significantly from the cost of maintaining other space, appropriate weighting factors may be used to give effect to such variations;

(iii) Where more definitive information is not available, either of the following simplified techniques for determining space may be used, as most appropriate—

(*a*) Reduce the total space identified with instruction and research by the amount of space occupied by undergraduate students, including appropriate portions of classrooms and access and related space. Reduce by the same proportion the amount of maintenance and operation expense that has been apportioned to instruction and research, and then allocate to research agreements on the basis of the relationship that direct salaries and wages of research agreements bears to direct salaries and wages of instruction and research; or

(*b*) Prepare a reasonable estimate of the average gross space assigned per research worker, and extend to the equivalent annual number of research workers under research agreements. The resulting product should then be related to total space assigned to instruction and research in order to obtain the proportion of space utilized for research agreements. The resulting proportion should then be applied to operation and maintenance expense to obtain the amount allocable to research agreements; or

(*c*) Where it can be demonstrated that an area or volume of space basis of allocation is impractical or inequitable, other bases may be used provided consideration is given to the use of facilities by research personnel and others, including students;

(4) "Library expenses" should normally be allocated to research agreements on the basis of population including students and other users. Where appropriate, consideration may be given to weighting segments of the population figures as necessary to produce equitable results;

(5) "Use allowance for buildings and equipment" should, if depreciation or other equivalent costs are not considered, be computed in accordance with § 15.304(e). The cost of buildings and equipment used by "other institutional activities" (as defined in § 15.302–6) should be excluded from any computation of use allowances. If available records permit, use allowances may be specifically allocated in whole or in part to research agreements. In the absence of such usable records, use allowance may be allocated to research agreements on the same basis as that used for allocating operation and maintenance expenses; and

(6) "Indirect departmental expenses:" the salaries and wages of departmental heads and their offices, including the allocated portion of deans of schools and their offices, which jointly benefit both research agreements and other activities should be allocated between research agreements administered or supervised by the department and other work of the department on any equitable basis, possibly direct salaries and wages, total direct expenditures, or approximate time so devoted. Where equitable results would be obtained, the distribution may be made on a composite base which would include all schools and departments.

(c) Indirect costs allocated to research agreements normally should be treated as a common pool. The costs in such common pool should then be distributed to individual research agreements benefiting therefrom on a single rate basis. This rate will be the percentage which the indirect cost pool is of direct salaries and wages of the applicable research agreements. If appropriate, total direct expenditures may be used rather than salaries and wages.

(d) It is recognized that in certain cases, due to the nature of the work, the facilities or personnel involved, or other considerations, the application of a single indirect expense rate on research agreements may produce inequitable results to the institution or to the Government. In such cases, it may be necessary to develop two or more indirect expense rates by means of: (1) Appropriate adjustment to the basic indirect expense rate developed through use of the common pool, or (2) segregation of the indirect expenses allocated to research agreements into two or more indirect expense pools. In the latter case, the costs in each such pool will be distributed to the specific research agreements benefiting therefrom on the basis of direct wages and salaries or total direct expenditures, as appropriate. Examples of conditions which may justify the development of two or more pools of indirect expense are:

(i) Where the nature of a particular type of overhead cost requires a different basis of allocation to produce equitable results;

(ii) Where a research agreement or group of agreements or the facility in which such agreement(s) is performed provides its own services to a significant degree, as may be in the case of a hospital or a segregated or off-campus facility;

(iii) Where a research agreement requires significantly different degrees of indirect services from the institution. For example, such conditions may exist where: (*a*) Significant amounts of Government-owned facilities or equipment are provided in lieu of that normally furnished by the institution, (*b*) a research agreement requires an unusual amount of power or other utilities, (*c*) the cost of a special library provided in lieu of regular library services is reimbursed by the Government, or (*d*) construction constitutes a significant portion of the work; and

(iv) Where it is appropriate to associate certain costs more directly with the activities benefited, such as where the research work is performed on one campus of a multicampus university.

(e) Where research is separately administered, in whole or in part, or separate services are provided in lieu of those services normally provided by the institution, the cost of the normal institutional administration or other services replaced thereby shall be excluded from allocation to such research.

§ 15.306–4 Overhead determinations acceptable under special circumstances.

(a) Indirect costs may be claimed at a rate which is anticipated to be less than that which would otherwise be allowable with provisions made in the research agreement for adjustment if actual costs subsequently proved to be less than the claimed rate.

(b) The degree of preciseness required in the computation of indirect costs will be influenced by considerations such as the materiality of the amounts involved, the size of the educational institution, and the aggregate dollar volume of Government-sponsored research at the institution. Generally, where the total direct cost of Government-sponsored research and development work at an institution does not exceed $250,000 in a year, the use of abbreviated procedures in the determination of allowable indirect costs may be acceptable when the results obtained are equitable. For example, educational institutions which have a relatively small dollar volume of Government-sponsored research may compute allowable indirect expenses on the basis of data available in the institution's financial reports. One permissible method in such cases would contemplate the use of a single indirect expense pool composed of:

(1) General and administrative expenses, exclusive of unallowable costs (§ 15.307), but inclusive of allocable salaries and expenses of deans of schools and department heads:

(2) Operation and maintenance expenses; and

(3) Library expenses.

The indirect expense pool should then be allocated to research agreements and other activities of the institution on any equitable basis, possibly total expenditures (exclusive of capital expenditures).

§ 15.307 General standards for selected items of cost.

§ 15.307–1 Purpose and applicability.

(a) Section 15.307 provides standards to be applied to the extent deemed practicable in determining the allowability of certain items of cost. These standards should apply irrespective of whether a particular item of cost is properly treated as direct cost or indirect cost. Failure to mention a particular item of cost in the standards should not imply that it is either allowable or unallowable; rather determination as to allowability in such case should be based on the treatment or standards provided for similar or related items of cost.

(b) In case of discrepancy between the provisions of a specific research agreement and the applicable standards, the provisions of the research agreement should govern.

§ 15.307–2 Costs applicable to instruction.

Except as specifically noted, the following types of costs apply only to instruction and therefore do not enter into the costs of research agreements, either as direct costs or indirect costs, unless specific provision is made therefor in the research agreement:

(a) Commencement and convocation costs;

(b) Sabbatical leave costs, including leave of absence to employees for performance of graduate work or sabbatical study, travel, or research;

(c) Scholarships, fellowships, tuition and other forms of student aid costs. However, in certain cases such costs may be allocable in part to research agreements under the conditions set forth in § 15.307–3; and

(d) Student services costs, including such activities as deans of students, administration of student affairs, registrar, placement offices, student advisers, student health and infirmary services, and such other activities as are identifiable with student services. However, in the case of students actually engaged in work under research agreements, a proportion of student service costs measured by the relationship between hours of work by students on such research work and total student hours including all research time may be allowed as a part of research administration expenses.

§ 15.307–3 Allowable and unallowable costs.

(a) Advertising costs include the cost of advertising media and related technical and administrative costs. Only the following advertising costs are allowable: (1) Help wanted advertising, (2) other advertising necessary for the performance of the research agreement to the extent authorized.

(b) Bad debts including losses (whether actual or estimated) arising from uncollectible accounts and other claims, related collection costs, and related legal costs are unallowable.

(c) Capital expenditures are unallowable except as provided for in the research agreement. This includes costs of books, equipment and buildings, as well as repairs which materially increase the value or useful life of such equipment or buildings.

(d) Civil defense costs are those incurred in planning for, and the protection of life and property against, the possible effects of enemy attack. Reasonable costs of civil defense measures (including costs in excess of normal plant protection costs, first aid training and supplies, fire-fighting training, posting of additional exit notices and directions, and other approved civil defense measures) undertaken on the institution's premises pursuant to suggestions or requirements of civil defense authorities are allowable when apportioned to all activities of the institution. Capital expenditures for civil defense purposes shall not be allowed, but a use allowance may be permitted in accordance with provisions set forth elsewhere. Costs of local civil defense projects not on the institution's premises are unallowable.

(e) Communication costs including telephone services, local and long distance telephone calls, telegrams, radiograms, postage and the like are allowable.

(f) Compensation for personal services: Each institution shall maintain control over its salary and wage rates according to its established policy consistently applied: *Provided, however,* That the excess of salary and wage rates paid to personnel working on Government research agreements over salary and wage rates paid to personnel working on the institution's departmental research or other research will not be allowed unless specifically provided in the agreement or approved by the contracting officer. This principle does not prohibit the charging of the full salary of any temporary employee in whose favor a salary differential exists solely by virtue of the nature of his employment in accordance with the regular practice of the institution concerned. Faculty members shall be considered as employed for the period represented by the sum of all semesters and other periods during which they are required to work under the practice of the institution concerned. (Example: Professor of X institution is required to work two semesters of 4½ months each, or a total of nine months out of the academic year. His compensation is $5,400.00. During the summer months, July, August, and September, he works full time on Government research projects in the institution laboratory. Unless the established practice of the institution relating to summer compensation, not based on Government contract experience, would result in a different computation, his compensation for that period, chargeable by the institution to the Government research agreement, will be $1,800.00, computed as follows: ($5,400.00÷9=$600.00; $600.00 multiplied by 3=$1,800.00)).

(g) Contingency provisions to provide for events the occurrence of which cannot be foretold with certainty as to time, intensity, or with an assurance of their happening, are unallowable.

(h) Deans of faculty and graduate schools, or their equivalents, including their staffs and related expenses are allowable.

(i) Employee morale, health, and welfare costs and credits, such as house publications, health or first aid clinics and/or infirmaries, recreational activities, and employees' counseling services, incurred in accordance with the institution's established practice or custom for the improvement of working conditions, employer-employee relations, employee morale, and employee performance, are allowable. Such costs shall be equitably apportioned to all activities of the institution. Income generated from any of these activities shall be credited to the cost thereof unless such income has been irrevocably set over to employee welfare organization.

(j) Entertainment costs including costs of amusement, social activities, entertainment, and incidental costs relating thereto, such as meals, lodging, rentals, transportation, and gratuities, are unallowable.

(k) Equipment and other facilities: The cost of equipment or other facilities, including books purchased specifically for use on the project, are allowable where such purchases are approved by the sponsoring agency concerned or provided for by the terms of the research agreement.

(l) Fines and penalties: Costs resulting from violations of, or failure of the institution to comply with, Federal, State, and local laws and regulations are unallowable except when incurred as a result of compliance with specific provisions of the research agreement, or instructions in writing from the contracting officer.

(m) Insurance and indemnification:

(1) Insurance includes those types of insurance which the institution is required to carry, or which is approved, under the terms of the research agreement, and any other insurance which the institution maintains in the general conduct of its activities. Indemnification includes securing the institution against liabilities to third persons and other losses not compensated by insurance or otherwise.

(2) Costs of insurance required or approved, and maintained, pursuant to the research agreement, are allowable.

(3) Costs of other insurance maintained by the institution in connection with the general conduct of its activities, are allowable subject to the following limitations:

(i) Types and extent and cost of coverage shall be in accordance with sound institutional practice;

(ii) Costs of insurance or of any contributions to any reserve covering the risk of loss of or damage to Government-owned property are unallowable except to the extent that the Government shall have required or approved such costs;

(iii) Contributions to a reserve for an approved self-insurance program are allowable to the extent that the types of coverage, extent of coverage, and the rates and premiums would have been allowed had insurance been purchased to cover the risks;

(iv) Costs of insurance on the lives of officers or trustees are unallowable except where such insurance is part of an employee plan which is not unduly restricted; and

(v) Actual losses which could have been covered by permissible insurance (through an approved self-insurance program or otherwise) are unallowable unless expressly provided for in the research agreement, except: (*a*) Costs incurred because of losses not covered under nominal deductible insurance coverage provided in keeping with sound business practice are allowable; and (*b*) minor losses not covered by insurance, such as spoilage, breakage and disappearance of small hand tools, which occur in the ordinary course of doing business, are allowable.

(n) Interest costs for interest on borrowed capital or temporary use of endowment funds, however represented, are unallowable.

(o) Investment counsel and staff costs are unallowable.

(p) Labor relations costs incurred in maintaining satisfactory relations between the institution and its employees, including costs of labor management committees, employees' publications, and other related activities are allowable.

(q) Losses on other research agreements or contracts. Any excess of costs over income under any other research agreement or contract of any nature is unallowable. This includes, but is not limited to, the institution's contributed portion by reason of cost-sharing agreements or any under-recoveries through negotiation of flat amounts for overhead.

(r) Maintenance and repair costs necessary for the upkeep of property (including Government property unless otherwise provided for) which neither add to the permanent value of the property nor appreciably prolong its intended life but keep it in an efficient operating condition, are allowable.

(s) Material costs of purchased materials, supplies, and fabricated parts directly or indirectly related to the research agreement are allowable. Purchases made specifically for the research agreement should be charged thereto at their actual prices after deducting all cash discounts, trade discounts, rebates, and allowances received by the institution. Withdrawals from general stores or stockrooms should be charged at their cost under any recognized method of pricing stores withdrawals conforming to sound accounting practices consistently followed by the institution. Incoming transportation charges are a proper part of material cost. Direct material cost should include only the materials and supplies actually used for the performance of the research agreement, and due credit should be given for any excess materials retained, or returned to vendors. Due credit should be given for all proceeds or value received for any scrap resulting from work under the research agreement. Where Government-donated or furnished material is used in performing the research agreement, such material will be used without charge.

(t) Memberships, subscriptions, and professional activity costs: (1) Membership costs of the institution's membership in civic, business, technical, and professional organizations are allowable.

(2) Subscription costs of the institution's subscriptions to civic, business, professional, and technical periodicals are allowable, excepting those obtained for the library for which a use allowance is made.

(3) Meetings and conferences. This item includes cost of meals, transportation, rental of facilities for meetings, and costs incidental thereto, when the primary purpose of the incurrence of such costs is the dissemination of technical information. Such costs are allowable.

(u) Patent costs: Costs of preparing disclosures, reports, and other documents required by the research agreement and of searching the art to the extent necessary to make such invention disclosures, are allowable. In accordance with the clauses of the research agreement relating to patents, costs of preparing documents and any other patent costs, in connection with the filing of a patent application where title is conveyed to the Government, are allowable. (See also paragraph (ff) of this section.)

(v) Pension plan costs are allowable if in accordance with the established policies of the institution, provided such policies meet the test of reasonableness and the methods of cost allocation are not discriminatory, and provided appropriate adjustments are made for credits or gains arising out of normal and abnormal employee turnover or any other contingencies that can result in forfeitures by employees which inure to the benefit of the institution.

(w) Plant security costs including wages, uniforms and equipment of personnel engaged in plant protection, and necessary expenses to comply with Government security requirements, are allowable.

(x) Preresearch agreement costs are those which are incurred prior to the effective date of the research agreement whether or not they would have been allowable thereunder if incurred after such date. Such costs are unallowable unless specifically set forth and identified in the research agreement.

(y) Professional service costs; legal, accounting, engineering and other.

(1) Costs of professional services rendered by the members of a particular profession who are not employees of the intitution are allowable, subject to subparagraphs (2) and (3) of this paragraph, when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government. Retainer fees to be allowable must be reasonably supported by evidence of services rendered.

(2) Factors to be considered in determining the allowability of costs in a particular case include:

(i) The past pattern of such costs, particularly in the years prior to the award of Government research agreements;

(ii) The impact of Government research agreements on the institution's total activity;

(iii) The nature and scope of managerial services expected of the institution's own organization; and

(iv) Whether the proportion of Government work to the institution's total activity is such as to influence the institution in favor of incurring the cost, particularly where the services rendered are not of a continuing nature and have little relationship to work under Government research agreements.

(3) Costs of legal, accounting, and consulting services, and related costs, incurred in connection with organization and reorganization, and the prosecution of claims against the Government, are unallowable. Costs of legal, accounting and consulting services, and related costs, incurred in connection with patent infringement litigation, are unallowable unless otherwise provided for in the research agreement.

(z) Profits and losses on disposition of plant, equipment, or capital assets. Profits or losses of any nature arising from the sale or exchange of plant, equipment, or other capital assets, including sale or exchange of either short- or long-term investments, shall be excluded in computing research agreement costs.

(aa) Proposed costs are the costs of preparing bids or proposals on potential Government and non-Government research agreement or projects, including the development of engineering data and cost data necessary to support the institution's bids or proposals. Proposal costs of the current accounting period of both successful and unsuccessful bids and proposals normally should be treated as indirect costs and allocated currently to all activities of the institution, and no proposal costs of past accounting periods shall be allocable in the current period to the Government research agreement. However, the institution's established practices may be to treat proposal costs by some other recognized method. Regardless of the method used, the results obtained may be accepted only if found to be reasonable and equitable.

(bb) Public information services costs such as news releases pertaining to specific research or scientific accomplishment are unallowable unless specifically authorized by the sponsoring agency.

(cc) Rearrangement and alteration costs: Ordinary or normal rearrangement and alteration costs are allowable. Special arrangement and alteration costs incurred specifically for the project are allowable when such work has been approved in advance by the sponsoring agency concerned.

(dd) Reconversion costs are those incurred in the restoration or rehabilitation of the institution's facilities to approximately the same condition existing immediately prior to commencement of Government research agreement work, fair wear and tear excepted. Reconversion costs are allowable, only to the extent of the cost of removing Government property and the restoration or rehabilitation costs caused by such removal.

(ee) Recruiting costs such as "help wanted" advertising, operating costs of an employment office necessary to secure and maintain an adequate staff, travel costs of employees while engaged in recruiting personnel, and travel costs of applicants for interviews for prospective employment, are allowable. Where the institution uses employment agencies, costs not in excess of standard com-

mercial rates for such services are also allowable. Costs of special benefits or emoluments offered to prospective employees beyond recognized practices for recruiting such personnel are unallowable.

(ff) Royalties and other costs for use of patents. Royalties on a patent or amortization of the cost of acquiring a patent or invention or rights thereto, necessary for the proper performance of the research agreement and applicable to tasks or processes thereunder, are allowable unless:

(1) The Government has a license or the right to free use of the patent;

(2) The patent has been adjudicated to be invalid or has been administratively determined to be invalid;

(3) The patent is considered to be unenforceable; or

(4) The patent has expired.

(gg) Severance pay is a payment, in addition to regular salaries and wages, by institutions to employees whose services have been terminated. Severance pay is allowable as a cost only to the extent that it is required by law, employer-employee agreement, established policy that constitutes in effect an implied agreement on the institution's part, or circumstances of the particular employment. Severance payments are divided into two categories as follows:

(1) Those due to normal, recurring turnover. The actual costs of such severance payments shall be regarded as expense applicable to the current fiscal year and equitably apportioned to the institution's activities during that period; and

(2) Those due to abnormal or mass terminations. Abnormal or mass severance pay is of such a conjectural nature that measurement of cost by means of an accrual will not achieve equity to both parties. Thus accruals for this purpose are not allowable. However, the Government recognizes its obligation to participate, to the extent of its fair share, in any specific payment. Thus, allowability will be considered on a case-by-case basis.

(hh) Special services costs, such as general public relations activities, catalogs, and alumni activities, are unallowable.

(ii) Staff benefits are allowances and services provided by the institution to its employees as compensation in addition to regular wages and salaries. Costs of such staff benefits are allowable and include vacations, holidays, sick leave, military leave, employee insurance, social security taxes and workmen's compensation insurance. The payment of tuition or remission of tuition for employees and their families are allowable to the extent that such payments or remissions are made under established policies consistently applied.

(jj) Taxes: In general, taxes which the institution is required to pay and which are paid or accrued in accordance with generally accepted accounting principles, and payments made to local governments in lieu of taxes which are commensurate with the local government services received are allowable, except for:

(1) Taxes from which exemptions are available to the institution directly or which are available to the institution based on an exemption afforded the Government and in the latter case when the sponsoring agency makes available the necessary exemption certificates; and

(2) Special assessments on land which represent capital improvements.

Any refund of taxes, interest, or penalties, and any payment to the institution of interest thereon, attributable to taxes, interest, or penalties which were allowed as research agreement costs, shall be credited or paid to the Government in the manner directed by the Government provided any interest actually paid or credited to an institution incident to a refund of tax, interest, and penalty shall be paid or credited to the Government only to the extent that such interest accrued over the period during which the institution had been reimbursed by the Government for the taxes, interest, and penalties.

(kk) Transportation costs: Transportation costs include freight, express, cartage, and postage charges relating either to goods purchased, in process, or delivered. These costs are allowable. When such costs can readily be identified with the items involved, they may be direct costed as transportation costs or added to the cost of such items. Where identification with the materials received cannot readily be made, inbound transportation costs may be charged to the appropriate indirect cost accounts if the institution follows a consistent, equitable procedure in this respect. Outbound freight, if reimbursable under the terms of the research agreement, should be treated as a direct cost.

(ll) Travel costs: (1) Travel costs consist of transportation, lodging subsistence, and incidental expenses.

(2) Travel costs incurred by institution personnel in a travel status while on specific research business are allowable.

(3) Travel costs incurred in the normal course of over-all administration of the institution and applicable to the entire institution are allowable. Such costs shall be equitably apportioned to all work of the institution.

(4) Subsistence and lodging, including tips or similar incidental costs, are allowable either on an actual or per diem basis. The basis selected shall apply to an entire trip and not selected days of the trip.

(5) Costs of personnel movement of a special or mass nature are allowable only when authorized or approved in writing by the sponsoring agency or its authorized representative.

(mm) Termination costs: (1) Contract termination generally gives rise to the incurrence of costs or to the need for special treatment of costs, which would not have arisen had the contract not been terminated. Items peculiar to termination are set forth below. They are to be used in conjunction with all other provisions of this subpart in the case of contract termination.

(2) The cost of common items of material reasonably usable on the institution's other work shall not be allowable unless the institution submits evidence that it could not retain such items at cost without sustaining a loss. In deciding whether such items are reasonably usable on other work of the institution, consideration should be given to the institution's plans and orders for current and scheduled work. Contemporaneous purchases of common items by the institution shall be regarded as evidence that such items are reasonably usable on the institution's other work. Any acceptance of common items as allowable to the terminated portion of the contract should be limited to the extent that the quantities of such items on hand, in transit, and on order are in excess of the reasonable quantitative requirements of other work.

(3) If in a particular case, despite all reasonable efforts by the institution, certain costs cannot be discontinued immediately after the effective date of termination, such costs are generally allowable within the limitations set forth in this subpart, except that any such costs continuing after termination due to the negligent or willful failure of the institution to discontinue such costs shall be considered unacceptable.

(4) Loss of useful value of special tooling, and special machinery and equipment is generally allowable, provided:

(i) Such special tooling, machinery, or equipment is not reasonably capable of use in the other work of the institution;

(ii) The interest of the Government is protected by transfer of title or by other means deemed appropriate by the contracting officer; and

(iii) The loss of useful value as to any one terminated contract is limited to that portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the contract bears to the entire terminated contract and other Government contracts for which the special tooling, special machinery, and equipment was acquired.

(5) Rental costs under unexpired leases are generally allowable where clearly shown to have been reasonably necessary for the performance of the terminated cost, less the residual value of such leases, if:

(i) The amount of such rental claimed does not exceed the reasonable use value of the property leased for the period of the contract and such further period as may be reasonable, and

(ii) The institution makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease.

There also may be included the cost of alterations of such leased property, provided such alterations were necessary for the performance of the contract, and of reasonable restoration required by the provisions of the lease.

(6) Settlement expenses including the following are generally allowable:

(i) Accounting, legal, clerical, and similar costs reasonably necessary for:

(*a*) The preparation and presentation to contracting officers of settlement claims and supporting data with respect to the terminated portion of the contract; and

(b) The termination and settlement of subcontracts; and

(ii) Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.

(7) Subcontractor claims, including the allocable portion of claims which are common to the contract and to other work of the contractor are generally allowable.

Subpart D—Construction Contracts

§ 15.401 Definition of construction contract.

The term "construction contract" as used in this subpart means any contract for the construction, alteration, or repair of buildings, bridges, roads, or other kinds of real property. It does not include a contract for the manufacturing, producing, furnishing, construction, alteration, repair, processing or assembling of vessels, aircraft, or other kinds of personal property, regardless of the terms of any such contract as to payment or title.

§ 15.402 General basis for determination of costs.

The total cost of a cost-reimbursement type contract for construction or for architect-engineer services related to construction is the sum of the allowable costs incident to the performance of the contract, less applicable income and other credits. The tests used in determining the allowability of costs also include (a) reasonableness and (b) any limitations as to types or amounts of cost items set forth in this subpart or otherwise included in the contract. Failure to mention any item of cost in this subpart is not intended to imply that it is either allowable or not allowable. Income and other credits arising out of operations under the contract, where the related cost was reimbursed or accepted as an allowable cost, will be credited to the Government.

§ 15.403 Examples of items of allowable costs.

Subject to the requirements of § 15.402 with respect to the general basis for determining allowability of costs, the following items of cost are considered allowable within the limitations indicated:

(a) Bonds and insurance, including self-insurance, to the extent authorized by the contracting officer;

(b) Camp operations (but see § 15.404 (h));

(c) Freight, transportation, and material handling;

(d) Land and structures, temporary use thereof;

(e) Materials and supplies, including inspection, storage, salvage, and other usual expenses incident to the procurement and use thereof;

(f) Patents, purchased designs, and royalty payments, to the extent authorized by the contracting officer;

(g) Plant and equipment, purchase or rental thereof;

(h) Recruiting of personnel (including "help wanted" advertising);

(i) Restoration and cleanup of site and facilities, as directed by the contracting officer;

(j) Structures and facilities of a temporary nature;

(k) Subcontracts;

(l) Taxes, fees or charges, except those imposed upon, by reason of, or measured by the contractor's fee;

(m) Traveling expenses, to the extent authorized by the contracting officer;

(n) Utility services, such as communication, power, gas, and water;

(o) Vacation, holiday and severance pay, sick leave and military leave, to the extent required by law or specifically provided for elsewhere in the contract;

(p) Wages and salaries; and

(q) Pension and retirement plans in accordance with the interpretation set forth in § 15.406 and group health, accident and life insurance plans (but see § 15.404 (b), (d), and (m)).

§ 15.404 Examples of items of unallowable costs.

The following items of costs are considered unallowable, except as indicated and then only subject to the requirements of § 15.402:

(a) Advertising (including advertising in trade or technical journals), except "help wanted" advertising;

(b) Central office expenses of the contractor, such as supplies, equipment, rent, or any other expenses incident to its maintenance and operation, except to the extent authorized by the contracting officer;

(c) Commissions and bonuses (under whatever name) in connection with obtaining or negotiating for a Government contract;

(d) Compensation and traveling expenses of any officer or employee in the central office organization of the contractor, except to the extent authorized by the contracting officer;

(e) Contingency reserves;

(f) Contributions and donations;

(g) Dividend payments;

(h) Entertainment, except for on-site recreational activities for the contractor's employees as authorized by the contracting officer;

(i) Interest on borrowings (however represented), bond discount and expense, and financial charges;

(j) Legal, accounting and consulting fees and related expenses, except to the extent authorized by the contracting officer;

(k) Losses on other contracts;

(l) Memberships in trade, business, and professional organizations;

(m) Premiums for insurance on the lives of directors, officers, proprietors, or other persons, where the contractor is the beneficiary directly or indirectly;

(n) Storage of contract records after completion of contract operations, irrespective of contractual or statutory requirements regarding the preservation of records; and

(o) Taxes, fees, or charges imposed upon, by reason of, or measured by the contractor's fee.

§ 15.405 Examples of subjects requiring special considerations.

The following examples are illustrative of subjects affecting cost which may require special consideration:

(a) Costs incurred incidental to work covered by the contract but prior to the execution of the contract, with specific identification of the types thereof and the period involved;

(b) Government-furnished property, general nature and extent;

(c) Indirect cost basis (1) actual, (2) negotiated rate or amount, or (3) other;

(d) Insurance;

(e) Intracompany and intercompany transactions;

(f) Liability to third persons;

(g) Operation of restaurants and cafeterias;

(h) Overtime compensation (see § 12.102 of this chapter);

(i) Patents, purchased designs, and royalty payments;

(j) Personnel movement of a special or mass nature;

(k) Plant facilities fully depreciated or amortized on the contractor's books of account or acquired without cost (possible compensation for utilization in the form of a use or rental charge);

(l) Rearrangement or relocation of facilities or plant sites;

(m) Research programs of a general nature;

(n) Security measures of a special nature;

(o) Sharing of cost of research projects of the type which an educational or other nonprofit institution might undertake as a part of its own educational or research program;

(p) Subcontracting, nature and extent thereof and relation to fee or profit;

(q) Subsistence and housing of employees;

(r) Termination expenses;

(s) Tooling and equipment;

(t) Traveling expenses of a special or unusual nature; and

(u) Wages or salaries of partners or sole proprietors.

§ 15.406 Cost interpretation of pension and retirement plans.

(See § 15.403(q).)

(a) Costs of pension and retirement plans, including reasonable incidental benefits, such as disability, withdrawal, insurance or survivorship allowances which are deductible from taxable income in accordance with the Internal Revenue Code and the regulations of the Bureau of Internal Revenue, are allowable except to the extent they are determined to be unreasonable or unallowable under any other provision of this cost interpretation. Costs of such plans established by nonprofit or other organizations not subject to payment of Federal income taxes are also allowable except to the extent they are determined to be unreasonable or unallowable under any other provision of this cost interpretation.

(b) Pension or retirement plans of a contractor which are subject to approval of the Bureau of Internal Revenue must have been so approved before costs under the plans may be accepted as charges to Government contracts. Many plans of nonprofit or other tax exempt organ-

izations are also reviewed and approved by the Bureau of Internal Revenue—when not so reviewed and approved, each such plan will be reviewed, and approved or disapproved, by the Department to which audit cognizance is assigned, using, insofar as applicable, the criteria and standards of the Internal Revenue Code and the regulations of the Bureau of Internal Revenue. In any case where the Bureau of Internal Revenue withdraws approval of a plan, approval of amounts allocated to contract costs will be withdrawn accordingly.

(c) The approval of a pension or retirement plan by the Bureau of Internal Revenue will, as a general rule, be the only approval required by the Departments; however, the right is reserved to require submission of any plan for consideration by a Department and to disapprove such plan in its entirety or any feature thereof whenever the circumstances in a particular case are deemed to warrant such action. Such consideration will be the responsibility of the Department to which audit cognizance is assigned, and the subsequent action taken by that Department will generally be accepted by the other Departments.

(d) Approval of a pension or retirement plan by the Bureau of Internal Revenue or by the Departments does not imply that the cost thereof for any particular year will be allowable for apportionment to contract costs, except to the extent costs for that year meet all other requirements of the Bureau of Internal Revenue as a deduction for income tax purposes, and are acceptable under the provisions of this cost interpretation and other provisions of this Section.

(e) Pension and retirement costs constitute a part of the total compensation by a contractor to any individual covered by the plan, and accordingly, are subject to the provisions of this Section with respect to reasonableness of the total compensation paid to the individual for the services rendered.

(f) Where contributions to pension or retirement plans are based on profits: *Providing*, That provisions of the Internal Revenue Code and regulations of the Bureau of Internal Revenue have been met, the amount allowable for apportionment to contracts in any one year shall be the amount contributed to the pension trust(s) for that year, but not to exceed 15 percent of the total compensation otherwise paid or accrued in that year to the individuals covered under the plan(s).

(g) The allowability of costs of lump sum purchases of annuities or of periodic cash payments made to provide pension or retirement benefits for retiring or retired employees, other than incurred under approved pension or retirement plans, will be subject to consideration on an individual case basis.

(h) Credits which became available or are foreseeable must be taken into account in an equitable manner in determining pension and retirement costs subject to apportionment to a military contract. In some instances, this may require adjustments to costs in anticipation of the realization of credits. For example, such action would normally be appropriate where contractors' organizations are substantially expanded for the performance of military contracts and there is a reasonable expectation that, upon completion of the contracts, the services of practically all or a large number of the additional employees will be terminated with the result that contractors will benefit from contributions made on behalf of these employees, because such personnel will not acquire vested rights under the terms of the plans.

(i) In any current or future contract no cost allowance will be made which would duplicate, in whole or in part, an allowance previously made under a prior contract.

Subpart E—[Reserved]

Subpart F—Guidelines for Application in the Negotiation and Administration of Fixed-Price Type Contracts and in the Negotiation of Termination Settlements

§ 15.600 Scope of subpart.

This subpart provides guidance for the use of Subparts B, C, and D of this part (a) in the evaluation of costs in pricing of negotiated fixed-price type contracts and subcontracts in those instances where such evaluation is required to establish prices for such contracts and (b) in the negotiation of termination settlements.

§ 15.601 Definition of fixed-price type contracts.

"Fixed-price type" contracts include, for purpose of this chapter, the following:

(a) Firm fixed-price contracts (§ 3.403–1 of this chapter)

(b) Fixed-price contracts with escalation (§ 3.403–2 of this chapter)

(c) Fixed-price contracts providing for the redetermination of price (§ 3.403–3 of this chapter)

(d) Fixed-price incentive contracts (§ 3.403–4 of this chapter)

(e) Non-cost-reimbursable portion of time and materials contracts (§ 3.405–1 of this chapter)

(f) Labor-hour contracts (§ 3.405–2 of this chapter)

§ 15.602 Basic considerations.

(a) Under fixed-price type contracts, the negotiated price is the basis for payment to a contractor whereas allowable costs are the basis for reimbursement under cost-reimbursement type contracts. Accordingly, the policies and procedures of Subpart H, Part 3, of this chapter, are governing and shall be followed in the negotiation of fixed-price type contracts. Cost and accounting data may provide guides for ascertaining fair compensation but are not rigid measures of it. Other types of data, criteria, or standards may furnish reliable guides to fair compensation. The ability to apply standards of business judgment as distinct from strict accounting principles is at the heart of a negotiated price or settlement.

(b) Among the different types of fixed-price type contracts, the need for consideration of costs varies considerably as indicated below:

(1) *Retrospective pricing and settlements.* In negotiating firm fixed prices or settlements for work which has been completed at the time of negotiation (e.g., final negotiations under fixed-price incentive contracts, redetermination of price after completion of the work, or negotiation of a settlement agreement under a contract terminated for the convenience of the Government), the treatment of costs is a major factor in arriving at the amount of the price or settlement. However, even in these situations, the finally agreed price or settlement may represent something other than the sum total of acceptable costs plus profit, since the final price accepted by each party does not necessarily reflect agreement on the evaluation of each element of cost, but rather a final resolution of all issues in the negotiation process.

(2) *Forward pricing.* The extent to which costs influence forward pricing varies greatly from case to case. In negotiations covering future work, actual costs cannot be known and the importance of cost estimates depends on the circumstances. The contracting officer must consider all the factors affecting the reasonableness of the total proposed price, such as the technical, production or financial risk assumed, the complexity of work, the extent of competitive pricing, and the contractor's record for efficiency, economy and ingenuity, as well as available cost estimates. He must be free to bargain for a total price which equitably distributes the risks between the contractor and the Government and provides incentives for efficiency and cost reduction. In negotiating such a price, it is not possible to identify the treatment of specific cost elements since the bargaining is on a total price basis. Thus, while cost data is often a valuable aid, it will not control negotiation of prices for work to be performed, or a target price under an incentive contract.

§ 15.603 Cost principles and their use.

(a) When, pursuant to § 15.602, costs are to be considered in the negotiation of fixed-price type contracts, the appropriate subpart of this part shall be used as a guide in the evaluation of cost data required to establish a fair and reasonable price in conjunction with other pertinent considerations as set forth more fully in Subpart H, Part 3, of this chapter, and—in the case of negotiated termination settlements—Subpart C, Part 8 of this chapter.

(b) In retrospective pricing, whenever an occasion arises in which acceptability of a specific item of cost becomes an issue, the appropriate part of this Part 15 will serve as a guide for the contracting officer in his conduct of negotiations.

(c) In applying this part to fixed-price contracts, contracting officers will: (1) Not be expected to negotiate agreement on every individual element of cost; and (2) be expected to use their judgment as

to the degree of detail in which they consider the individual elements of cost in arriving at their evaluation of total cost, where such evaluation is appropriate. However, the negotiation record should fully substantiate and justify the reasoning leading to any negotiated price.

(d) In order to permit the proper evaluation of cost data submitted by contractors for use in negotiating prices, it may be necessary to obtain breakdowns or account analyses in respect to some cost items particularly those whose treatment may be dependent upon special circumstances as stated in the principles. Contractors will be expected to be responsive to reasonable requests for data of this kind.

PART 16—PROCUREMENT FORMS

Sec.
16.000 Scope of part.

Subpart A—Forms for Advertised Supply Contracts

16.100 Scope of subpart.
16.101 Separate award type (Standard Forms 30, 31, 32, 26, and 36, and DD Form 1260).
16.101–1 General.
16.101–2 Conditions for use.
16.102 Combination type (Standard Form 33).
16.102–1 General.
16.102–2 Conditions for use.

Subpart B—Forms for Negotiated Procurement

16.200 Scope of subpart.
16.201 Request for quotation (Standard Form 18).
16.201–1 General.
16.201–2 Conditions for use.
16.202 Negotiated contract forms (DD Forms 1261 and 1270).
16.203 Request for Proposals, Proposal and Acceptance (DD Forms 746, 746–1, 746–2).
16.203–1 General.
16.203–2 Conditions for use.
16.204 General Provisions; Cost-Reimbursement Supply Contract (DD Form 748).
16.205 General Provisions; Fixed-Price Supply Contracts (Standard Form 32).
16.206 Cost and Price Analysis Forms (DD Forms 633, 633–1, 633–2, and 633–3).
16.206–1 General.
16.206–2 DD Form 633 (Cost and Price Analysis).
16.206–3 DD Forms 633–1, 633–2, and 633–3.
16.207 Cost Analysis for Contract Price Redetermination (DD Form 784).
16.207–1 General.
16.207–2 Conditions for use.
16.207–3 Forms superseded.

Subpart C—Purchase and Delivery Order Forms

16.300 Scope of subpart.
16.301 Receipt for cash—subvoucher (Standard Form 1165).
16.302 Purchase Order-Invoice-Voucher (Standard Form 44).
16.303 Order for supplies or services (DD Forms 1155, 1155r, 1155c, 1155c–1, and 1155s).
16.303–1 General.
16.303–2 Conditions for use.
16.303–3 Forms superseded.
16.304 Blanket purchase order.

Subpart D—Construction Contract Forms

16.400 Scope of subpart.
16.401 Standard Forms 19, 19A, 20, 21, 22, 23 and 23A, and DD Form 1260.
16.401–1 General.
16.401–2 Use of forms for negotiated construction contracts.
16.401–3 Conditions for use.
16.401–4 Terms, conditions and provisions.

Subpart E—Special Contract and Order Forms

16.500 Scope of subpart.
16.501 Negotiated utility service contract forms.
16.501–1 Estimated annual cost $2,400 or less (DD Form 671).
16.501–2 Estimated annual cost over $2,400.
16.502 Negotiated contract form for stevedoring services (DD Form 674).
16.502–1 General.
16.502–2 Conditions for use.
16.502–3 Single job stevedoring services.
16.503 Master Contract for Repair and Alteration of Vessels (DD Forms 731 and 731–1).
16.503–1 General.
16.503–2 Inviting bids or quotations for job orders.
16.503–3 Issuance of job order (DD Form 731–1).
16.503–4 Emergency work required prior to issuance of a job order.
16.503–5 Repair costs not readily ascertainable.
16.503–6 Modification of master contracts.
16.504 Order for Paid Advertisements (Standard Forms 1143 and 1144).
16.505 Novation agreements.
16.505–1 Scope of section.
16.505–2 Agreement to recognize a successor in interest.
16.505–3 Agreement to recognize change of name of contractor.
16.506 Communication Service Authorization (DD Form 428).

Subpart F—Forms for Coordinated Procurement

16.600 Scope of subpart.
16.601 Military Interdepartmental Purchase Request (DD Form 448, 448–1).
16.602 Requisition for Coal, Coke, or Briquettes (DD Form 416).

Subpart G—Contract Termination Forms

16.700 Scope of subpart.
16.701 Notices of termination.
16.702 Settlement proposal forms.
16.702–1 Settlement proposal; inventory basis (DD Form 540).
16.702–2 Settlement proposal; total cost basis (DD Form 541).
16.702–3 Settlement proposal for cost-reimbursement type contracts (DD Form 547).
16.702–4 Settlement proposal; short form (DD Form 831).
16.702–5 Inventory schedules (DD Forms 542, 543, 544, 545, and 832).

Sec.
16.702–6 Schedule of accounting information (DD Form 546).
16.703 Application for partial payment (DD Form 548).
16.704 Notice of audit status date (DD Form 547s).
16.705 Forms of settlement agreement.
16.706 Instructions for use of termination forms.

Subpart H—Miscellaneous Forms

16.800 Scope of subpart.
16.801 Statement and Certificate of Award (Standard Form 1036).
16.802 Statement on Contingent Fees (Standard Form 119).
16.803 Compliance with labor laws, regulations and clauses.
16.803–1 Construction contracts.
16.803–2 Supply contracts.
16.804 U. S. Government Tax Exemption Certificate (Standard Form 1094—Revised).
16.804–1 Conditions for use.
16.804–2 Supply of forms.
16.805 Bond forms.
16.806 Royalty Report Form (DD Form 783).
16.807 Individual Procurement Action Report (DD Form 350).
16.808 Duty Free Entry Certificate (Customs Form 7501). [Reserved]
16.809 Report of Inventions and Subcontracts (DD Form 882).
16.810 Bidders Mailing List Application (Standard Form 129) and Bidders Mailing List Application Supplement (DD Form 558–1).
16.810–1 General.
16.810–2 Conditions for use.
16.810–3 Item listings for information of bidders.
16.811 Security Requirements Check List (DD Form 254).
16.812 Release and assignment forms.
16.813 Change order price analysis (DD Form 1107).
16.813–1 General.
16.813–2 Conditions for use.
16.813–3 Forms superseded.
16.814 Experience data forms.
16.814–1 Architect-engineer experience data (DD Form 1071).
16.814–2 Construction contractor experience data (DD Form 1072).
16.815 Contract modification forms.
16.815–1 Change Order (DD Form 1319).
16.815–2 Supplemental Agreement (DD Form 1320).

AUTHORITY: §§ 16.000 to 16.815-2 issued under R. S. 161, sec. 2202, 70A Stat. 120; 5 U. S. C. 22, 10 U. S. C. 2202. Interpret or apply secs. 2301-2314, 70A Stat. 127-133; 10 U. S. C. 2301-2314.

§ 16.000 Scope of part.

This part prescribes forms for use in connection with the procurement of supplies and services. In using these forms for procurement outside the United States, its Territories, its possessions, and Puerto Rico, contract provisions which are made inapplicable to such procurement by this subchapter or by departmental procedures may be deleted.

Subpart A—Forms for Advertised Supply Contracts

§ 16.100 Scope of subpart.

This subpart prescribes forms for use in procuring supplies by formal advertising; it is not applicable to specialized procurements for which other instructions are given by this subchapter or departmental procedures.

§ 16.101 Separate award type (Standard Forms 30, 31, 32, 26 and 36, and DD Form 1260).[1]

§ 16.101–1 General.

Except as provided in § 16.102, the following supply contract forms shall be used in effecting procurements by formal advertising:

(a) Invitation and Bid (Standard Form 30);

(b) Schedule (Standard Form 31);

(c) General Provisions (Supply Contract) (Standard Form 32);

(d) Any other special terms for the invitation for bids or additional contract provisions which are prescribed by this subchapter or Departmental procedures;

(e) Award (Standard Form 26);

(f) Continuation Sheet (Standard Form 36) (when needed with Standard Forms 31 or 26 or DD Form 1260[1]); and

(g) Amendments to Invitation for Bids (DD Form 1260[1]) when needed.

§ 16.101–2 Conditions for use.

(a) The Invitation for Bids (Standard Form 30), and the Schedule (Standard Form 31) shall be prepared in accordance with § 2.201.

(b) Standard Form 32 and any additional general provisions may be attached to each copy of the Invitation for Bids. Alternatively, one copy only of Standard Form 32 and any additional general provisions need be furnished to each bidder, for retention, if such provisions are specifically incorporated by reference, including each form name, number and date, in Standard Form 30 or 31. Provisions which are inapplicable to a particular procurement, or to military procurements generally may be deleted by appropriate reference in an "Alterations in Contract" clause.

(c) Award of contracts shall be accomplished by furnishing a completed Standard Form 26 to each successful bidder. Papers previously forwarded to bidders need not accompany the successful bidder's copy of Standard Form 26. The required use of Standard Form 26 does not preclude the additional use of informal documents, including telegrams, as notices of award.

(d) DD Form 1260[1] (Amendment to Invitation for Bids) shall be used when it is necessary to issue an amendment.

§ 16.102 Combination type (Standard Form 33).

§ 16.102–1 General.

Standard Form 33, which is a combination Invitation for Bids, Bid, Schedule, and Award, may be used to effect procurement by formal advertising, in lieu of Standard Forms 30, 31 and 26, whenever the space available on Standard Form 33 for the Schedule and the Award is sufficient. The following forms are prescribed for use with Standard Form 33:

(a) General Provisions (Supply Contract) (Standard Form 32);

(b) Any other special terms for the invitation for bids or additional contract provisions, which are prescribed by this subchapter or Departmental procedures;

(c) Continuation Sheet (Standard Form 36) (when needed with Standard Form 33 or DD Form 1260[1]); and

(d) Amendment to Invitation for Bids (DD Form 1260), when needed.

§ 16.102–2 Conditions for use.

(a) The Invitation for Bids and Schedule portions of Standard Form 33 shall be prepared in accordance with § 2.201.

(b) Standard Form 32 and any additional general provisions shall be utilized in accordance with the conditions specified in § 16.101–2(b).

(c) Award of contracts shall be accomplished by completing the Award portion of Standard Form 33 and furnishing a copy of the form, so completed, to each successful bidder. The required use of the Award portion of Standard Form 33 does not preclude the additional use of informal documents, including telegrams, as notices of award.

(d) DD Form 1260[1] (Amendment to Invitation for Bids) shall be used when it is necessary to issue an amendment.

Subpart B—Forms for Negotiated Procurement

§ 16.200 Scope of subpart.

This subpart prescribes forms for use in procuring supplies or services by negotiation (see also Subpart C of this part, Purchase and Delivery Order Forms); it is not applicable to specialized procurements for which other instructions are given by this subchapter or departmental procedures.

§ 16.201 Request for quotation (Standard Form 18).

§ 16.201–1 General.

Standard Form 18 is prescribed to obtain price, cost, delivery, and related information from suppliers.

§ 16.201–2 Conditions for use.

Standard Form 18 is authorized for use when it appears reasonably certain that the procurement will be consummated by (a) a fixed-price type contract involving extensive negotiation or, (b) a cost-reimbursement type contract. Standard Form 36 (Continuation Sheet), or DD Form 1155c (Continuation Sheet) may be used as required. Standard Form 18 may be used for negotiated procurements in excess of $2,500 and shall be used for negotiated procurements of $2,500 or less (including purchase orders) when written solicitations (other than by telegram) of quotations are used (see § 3.603 of this chapter). A quotation submitted on this form is not to be construed as an offer which can be accepted by the Government to form a binding contract. Therefore, issuance by the Government of a purchase order pursuant to a supplier's quotation does not constitute a contract, but the purchase order is an offer by the Government to the supplier to buy certain goods or services upon specified terms and conditions.

[1] Filed as part of the original document.

§ 16.202 Negotiated contract forms (DD Forms 1261 and 1270).

(a) *General.* (1) DD Form 1261[1] (Negotiated Contract) is designed for use in entering into negotiated contracts where the signature of both parties on a single document is appropriate.

(2) DD Form 1270 (General Provisions (Short Form Negotiated Contract)) is designed for use with DD Form 1261 as set forth in (b) below, but need not be used in contracts to be performed outside the United States, its Territories, its possessions or Puerto Rico.

(3) DD Form 1261 (Negotiated Contract), in conjunction with appropriate General Provisions (as provided in paragraphs (b), (c), and (d) of this section), is prescribed for use in entering into negotiated contracts except:

(i) Contracts for which DD Forms 746, 746–1, and 746–2 are used in accordance with § 16.203;

(ii) Contracts for the construction, alteration, or repair of buildings, bridges, roads, or other kinds of real property;

(iii) Procurements for which special contract forms are prescribed by this subchapter (for example, §§ 16.501, 16.503, 16.504, 16.505, and 16.506); and

(iv) Procurements for which purchase order and related forms are authorized by Subpart C of this part.

(b) *Short form negotiated supply and services contracts.*

(1) Except as provided in paragraph (a) (2) and (3) of this section, DD Form 1261 (Negotiated Contract), and DD Form 1270 (General Provisions (Short Form Negotiated Contract)), shall be used for negotiated fixed-price type supply contracts which do not exceed $10,000 and which are for standard or commercial items not involving special inspection due to complicated specifications. These forms may be used also for nonpersonal services contracts which do not exceed $10,000. Standard Form 36 (Continuation Sheet) shall be used for the Schedule and Continuation Sheet.

(2) No clause on DD Form 1270 may be deleted or altered, and no other clause covering the subject matter of any clause set forth in this subchapter may be used, except:

(i) Deletions and additions of clauses authorized for use by overseas activities may be made in accordance with Departmental procedures;

(ii) The "Variation in Quantity" clause (§ 7.103–4 of this subchapter) and implementing provisions may be inserted in the Schedule where appropriate;

(iii) The "Preference for Certain Domestic Commodities" clause (§ 6.305 of this subchapter) may be inserted in the Schedule, where required by Subpart C, Part 6 of this subchapter.

(iv) Where the contract is solely for the procurement of data, one of the clauses set forth in §§ 9.203 through 9.206 of this subchapter may be added as required by the instructions in Subpart B, Part 9 of this subchapter.

(v) The "Soviet-Controlled Areas" clause (§ 6.403 of this subchapter) shall be inserted in the Schedule where appropriate;

(vi) Where the contract is for services, the Termination for Convenience of the Government clause set forth in § 8.705 of this subchapter shall be inserted in the Schedule, and Paragraph 7 of the General Provisions deleted;

(vii) The "Priorities, Allocations and Allotments" clause (§ 7.104–18 of this subchapter) may be inserted in the Schedule where required; and

(viii) The "Federal, State and Local Taxes" clause (§ 11.401–1 of this subchapter) may, in the discretion of the contracting officer, be inserted in the Schedule.

(c) *Long form negotiated supply contracts.* (1) Except as provided in paragraphs (a) (3) and (b) of this section, DD Form 1261[1] (Negotiated Contract) shall be used with Standard Form 32 (General Provisions (Supply Contract)), any other forms containing contract provisions which are prescribed by this subchapter or Departmental procedures, and Standard Form 36 (Continuation Sheet) for entering into negotiated fixed-price type supply contracts to which Part 7, Subpart A of this subchapter, is applicable.

(2) Except as provided in paragraph (a) (3) of this section, DD Form 1261[1] (Negotiated Contract) shall be used with DD Form 748 (General Provisions-Cost-Reimbursement Supply Contracts), any other forms containing contract provisions which are prescribed by this subchapter or Departmental procedures, and Standard Form 36 (Continuation Sheet) for entering into negotiated cost-reimbursement type contracts to which Part 7, subpart B of this subchapter, is applicable.

(d) *Special negotiated contracts.* DD Form 1261[1] (Negotiated Contracts) may be used for special procurements, where clauses other than those on DD Form 1270,[1] Standard Form 32, or DD Form 748 have been authorized. For example, cost-reimbursement type research and development contracts with clauses prescribed by Part 7, subpart D of this subchapter; contracts for stevedoring services (DD Form 674); time and materials contracts; personal and professional services contracts; and contracts for instruction of military personnel at educational institutions.

(e) *Corporate certificate.* Where a corporate certificate is considered necessary or desirable, it may be executed on a typed sheet, identified by contract number, and attached to DD Form 1261.[1]

(f) *Schedule and continuation sheet.* Standard Form 36 (Continuation Sheet) shall be used for the Schedule and Continuation Sheets; however, where the columns thereon are not required, a blank sheet may be used in lieu thereof, *provided* the contract number, page number, and name of contractor are shown thereon.

§ 16.203 Request for Proposals, Proposal and Acceptance (DD Forms 746, 746–1, 746–2).

§ 16.203–1 General.

The following forms are prescribed for use under the conditions set forth in § 16.203–2 in effecting negotiated fixed-price procurement of supplies or services (other than personnel);

(a) Request for Proposals and Proposal (Negotiated Fixed-Price Contract) (DD Form 746);

(b) Schedule, Request for Proposals and Proposal (DD Form 746–1);

(c) General Provisions (Supply Contract) (Standard Form 32) (only when procuring supplies);

(d) Any other forms containing contract provisions which are prescribed by this subchapter or departmental procedures;

(e) Acceptance of Proposal (Negotiated Fixed-Price Contract) (DD Form 746–2); and

(f) Continuation Sheet (Standard Form 36) (when needed with DD Form 746–1 or DD Form 746–2).

(g) Amendment to Request for Proposals (DD Form 746s), when needed.

§ 16.203–2 Conditions for use.

(a) DD Forms 746 and 746–1 (together with authorized contract provisions) shall be used in connection with the negotiation of fixed-price contracts for supplies or services (other than personal) when it appears desirable to commence negotiations by soliciting written offers which, if there is written acceptance by the Government, would create a binding contract without further action.

(b) When proposals have been submitted on DD Forms 746 and 746–1 and it is in the interest of the Government and is in accordance with § 3.805–1(b) of this chapter to accept a prospective contractor's proposal without further negotiation, price and other factors considered, DD Form 746–2 shall be used. In such instances, the contract will consist of the appropriate documents listed in § 16.203–1.

(c) When a proposal submitted by a prospective contractor leads to further negotiation, the resulting contract shall be prepared in accordance with § 16.202, except that: (1) If the circumstances are such that the prospective contractor can amend its proposal in writing to reflect any necessary changes, the amended proposal may be accepted on DD Form 746–2; or (2) if all the terms and conditions agreed to as a result of such further negotiation are specifically and clearly set forth in identifiable writings, but such writings are unsuitable or too voluminous to permit acceptance of the amended proposal on DD Form 746–2 and if the circumstances of the procurement require prompt acceptance of the modified proposal, the proposal as thus modified by such further negotiation may be accepted by the issuance of a notice of award in substantially the format set forth below. In cases within subparagraph (1) of this paragraph, the use of DD Form 746–2 does not preclude the additional use of informal documents, including telegrams, as notices of award. In cases within subparagraph (2) of this paragraph, all of the terms and conditions of the contract thereby created shall be, without change or modification, promptly consolidated into a contract using the forms authorized by § 16.202, and a signed copy thereof, shall

[1] Filed as part of the original document.

be submitted to the General Accounting Office.

(Name and Address of Purchasing Office)

Date ----------

(Name and Address of Contractor)

Contract No. ------

Gentlemen:

Your proposal dated ----------, (in response to Request for Proposals No. ------, dated ----------) as amended by [list and identify all documents or portions thereof, such as letters, telegrams, and printed matter, from the prospective contractor and the Government, which together set forth the terms and conditions of the contract] for the furnishing of ----------, at a total price of $------, is accepted and award is hereby made.

A contract in the usual form, dated and numbered as set forth above, incorporating all the terms and conditions of the contract hereby created is being prepared and will be forwarded to you in the near future.

This contract is authorized by and has been negotiated pursuant to 10 U.S.C. 2304 (a)( ).

UNITED STATES OF AMERICA

By ----------

(Name) Contracting Officer

(d) Standard Form 32, if applicable, and any other general provisions may be attached to each copy of the Request for Proposals. Alternatively, one copy only of Standard Form 32 and any other general provisions need be furnished to each supplier, for retention, if such provisions are specifically incorporated by reference, including each form name, number and date, in DD Form 746–1. Provisions which are inapplicable to a particular procurement, or to military procurements generally, may be deleted by appropriate reference in an "Alterations in Contract" clause.

(e) When a cost breakdown is required in connection with a proposal, DD Form 633 shall be used to the extent provided in § 16.206.

(f) This section does not preclude the use of the purchase order forms prescribed in Part 16, Subpart C of this subchapter.

(g) When it is necessary to issue an amendment to a request for proposals, DD Form 746s (Amendment to Request for Proposals) shall be used.

§ 16.204 General provisions; Cost-Reimbursement Supply Contract (DD Form 748).

DD Form 748 shall be attached to any negotiated contract to which Subpart B of this part is applicable. It contains all of the clauses required by § 7.203 of this subchapter and some of the clauses set forth in §§ 7.204 and 7.205 of this subchapter. The addition of other clauses set forth in Part 7, Subpart B, of this subchapter, or of other clauses not inconsistent with this subchapter, shall be accomplished by appending such clauses as "Additional General Provisions," numbered consecutively. The deletion or modification of clauses contained in the form or in the "Additional General Provisions" shall be accomplished by appropriate reference or provision in an "Alterations in Contract" clause. These instructions must be read in conjunction with Part 7, Subpart B, of this subchapter, to make certain that current clauses are in use at all times.

§ 16.205 General provisions; Fixed-Price Supply Contracts (Standard Form 32).

Any negotiated contract to which Part 7, Subpart A, of this subchapter is applicable will include Standard Form 32. The addition of other clauses set forth in Part 7, Subpart A, of this subchapter, or of other clauses not inconsistent with ASPR, shall be accomplished by including such clauses as "Additional General Provisions" numbered consecutively. The deletion or modification of clauses contained in the form or in the "Additional General Provisions" shall be accomplished by appropriate reference or provision in an "Alterations in Contract" clause. These instructions must be read in conjunction with Part 7, Subpart A, of this subchapter, to make certain that current clauses are in use at all times.

§ 16.206 Cost and Price Analysis Forms (DD Forms 633, 633–1, 633–2, and 633–3).

§ 16.206–1 General.

DD Forms 633, 633–1, 633–2 and 633–3 are designed for submission of cost data by contractors. Contractor reproduction of these forms is authorized.

§ 16.206–2 DD Form 633 (Cost and Price Analysis).

This form ordinarily shall be used whenever price analysis is required, except:

(a) The contractor may submit necessary data in a format acceptable to the contracting officer where the contractor's accounting system makes the use of this form impracticable;

(b) Other forms authorized by the Department concerned if approved by the Office of the Assistant Secretary of Defense (Comptroller) (See DOD Instruction No. 7760.1, dated September 30, 1955) may be used; or

(c) The Special Cost and Price Analysis Forms referenced in § 16.206–3 may be used.

§ 16.206–3 DD Forms 633–1, 633–2, and 633–3.

The following forms may be used as appropriate:

(a) DD Form 633–1 (Cost and Price Analysis—Technical Personnel Services Procurement);

(b) DD Form 633–2 (Cost and Price Analysis—Contract Negotiations for Technical Publications Preparation); or

(c) DD Form 633–3 (Cost and Price Analysis—Motion Picture Procurement).

§ 16.207 Cost Analysis for Contract Price Redetermination (DD Form 784).

§ 16.207–1 General.

DD Form 784 (Cost Analysis for Contract Price Redetermination) is designed to assure, to the fullest extent practicable, the uniform submission of cost data by contractors when such data are required for contract price redetermination. Contractor reproduction of the form is authorized.

§ 16.207–2 Conditions for use.

DD Form 784 shall be prepared by the contractor for the submission of cost data required for contract price redetermination except in those instances where the contractor and the appropriate departmental official have agreed upon an alternative method of cost analysis presentation.

§ 16.207–3 Forms superseded.

This form replaces existing departmental forms currently used solely for this purpose.

Subpart C—Purchase and Delivery Order Forms

§ 16.300 Scope of subpart.

This subpart prescribes forms for use (a) when purchases are authorized or required to be made by the purchase order or imprest fund method, and (b) as delivery orders.

§ 16.301 Receipt for cash—subvoucher (Standard Form 1165).

Standard Form 1165 may be used in connection with procurements by the imprest fund (petty cash) method in accordance with § 3.604 of this subchapter.

§ 16.302 Purchase Order-Invoice Voucher (Standard Form 44).

Standard Form 44 is authorized for use to accomplish small purchases in accordance with § 3.605 of this subchapter.

§ 16.303 Order for Supplies or Services (DD Form 1155, 1155r, 1155c, 1155c–1, and 1155s).

§ 16.303–1 General.

(a) The following forms are prescribed for use in accordance with the conditions set forth in §§ 16.303 to 16.303–2:

(1) DD Form 1155 (including its reverse side, 1155r), Order for Supplies or Services, provides in one document:

(i) A purchase order, delivery order under a contract, or delivery order on Government agencies outside the Department of Defense;

(ii) A receiving and inspection report;

(iii) A property voucher; and

(iv) A public voucher.

(2) DD Form 1155c, Continuation Sheet, provides additional Schedule space.

(3) DD Form 1155c–1, Commissary Continuation Sheet, provides columns suited for commissary procurements.

(4) DD Form 1155s, Additional General Provisions, Modification, and Acceptance, used with the DD Form 1155 in negotiated procurements of not more than $2,500, provides:

(i) Additional general provisions;

(ii) A block for the contracting officer to mark if the contractor's written acceptance is requested; and

(iii) A space for the contractor's signature when a written acceptance is requested.

(b) The foregoing forms may be used as snap-out manifold forms, as cut sheets, or as reproducible masters, as prescribed by Departmental procedures. DD Form 1155 is designed for mailing in window envelopes, and the use of such envelopes is encouraged.

§ 16.303–2 Conditions for use.

(a) *General.* The foregoing forms shall be used, as appropriate, regardless of the number of deliveries or payments contemplated, except where utility services are procured under GSA area contracts as provided in Part 5, Subpart H, of this subchapter. When used as purchase orders these forms shall be used only for the purchase of supplies as defined in § 7.102, or for services other than personal services.

(b) *Use as a purchase order of not more than $2,500:* DD Form 1155 is authorized for negotiated purchases of not more than $2,500: *Provided:*

(1) The procurement is unclassified;

(2) No clauses covering the subject matter of any clause set forth in this Regulation, other than clauses set forth on the back of DD Form 1155, and clauses referred to in subparagraphs (3), (4), (5) of this paragraph, and in paragraph (c) of this section, are to be used;

(3) Where the contract is solely for the procurement of data, one of the clauses set forth in §§ 9.203 through 9.206 of this chapter shall be added as appropriate in accordance with the instructions contained in Subpart B, Part 9 of this chapter;

(4) Where DD Form 1155s is not used and the procurement is for more than $1,000, the following clause shall be added:

RENEGOTIATION (NOV. 1958)

This contract, and any subcontract hereunder, is subject to the Renegotiation Act of 1951, as amended (50 U. S. C. App. 1211 et seq.), and shall be deemed to contain all the provisions required by Section 104 thereof, and is subject to any subsequent act of Congress providing for the renegotiation of contracts.

(5) When required by Part 6, subpart D, the contract clause set forth in § 6.403 of this chapter shall be added; and

(6) The DD Form 1155 shall not be used as a public voucher in a procurement of more than $1,000.

(c) *Use of DD Form 1155s.* DD Form 1155s is authorized for use in conjunction with DD Form 1155 if it is deemed to be in the best interest of the Government to consummate a binding contract between the parties before the contractor undertakes performance. No additional clauses are authorized except as provided in paragraph (b) (2) of this section.

(d) *Use as a delivery order.* Except as to specialized procurements for which other instructions are given by this subchapter or military department procedures, DD Form 1155 shall be used without monetary limitation as a delivery order for ordering supplies and services:

(1) under indefinite delivery type contracts (see § 3.405–5), including such contracts made by Government agencies outside of the Department of Defense: *Provided,* (i) The order is issued in accordance with, and subject to the terms and conditions of, such contract, and (ii) the order refers to the particular contract involved; and

(2) from Government agencies outside the Department of Defense.

(e) DD Form 1155c (Continuation Sheet) or Standard Form 36 (Continuation Sheet) shall be used if additional space is required, as provided by Departmental procedures.

§ 16.304 Blanket purchase order.

See Part 3, Subpart F, of this subchapter, and particularly § 3.606.

Subpart D—Construction Contract Forms

§ 16.400 Scope of subpart.

This subpart prescribes forms for use in connection with construction contracts, which are defined for the purposes of this subpart as contracts for the construction, alteration or repair (including painting and decorating) of buildings, bridges, roads, or other kinds of real property.

§ 16.401 Standard Forms 19, 19A, 20, 21, 22, 23, 23A, and DD Form 1260.

§ 16.401–1 General.

The following forms are prescribed for use in formally advertised construction contracts where the work is to be performed in the United States and its possessions:

(1) Standard Form 19—Invitation, Bid and Award (Construction, Alteration, or Repair).

(2) Standard Form 19A—Labor Standards Provisions—Applicable to Contracts in excess of $2,000.

(3) Standard Form 20—Invitation for Bids (Construction Contract).

(4) Standard Form 21—Bid Form (Construction Contract).

(5) Standard Form 22—Instructions to Bidders (Construction Contract).

(6) Standard Form 23—Construction Contract.

(7) Standard Form 23A—General Provisions (Construction Contract).

(8) DD Form 1260—Amendment to Invitation for Bids, on an optional basis.

(9) Continuation Sheet.—There is no prescribed form of Continuation Sheet for construction contracts. A blank sheet, incorporating (i) the contract or invitation number, as appropriate, (ii) page number and number of pages, and (iii) name of bidder or contractor may be used for this purpose. Standard Form 36, Continuation Sheet (Supply Contract) shall not be used for construction contracts.

§ 16.401–2 Use of forms for negotiated construction contracts.

Use of the forms prescribed in § 16.401–1 is optional for negotiated construction contracts. When used for negotiated contracts, the forms shall be adapted by lining out or obliterating the words "sealed" and "publicly opened" and adding language to (1) indicate the authority for negotiation, and (2) provide that wherever the words "invitation" and "bid" occur they shall be deemed to refer to "solicitation" and "offer," respectively.

§ 16.401–3 Conditions for use.

(a) *Contracts estimated not to exceed $2,000.* Standard Form 19 shall be used for construction contracts not in excess of $2,000 executed as a result of formal advertising. Standard Form 22 also may be used. When the contract may exceed $2,000, the following language shall be inserted in the space provided in the bid portion of Standard Form 19 prior to the issuance of the invitation:

If this bid exceeds $2,000, the bidder shall furnish with its bid a bid bond in an amount equal to ------ % of its bid; failure to submit the bond on time is cause for rejection of the bid. The undersigned further agrees, if this bid exceeds $2,000 (i) to comply with the Labor Standards Provisions Applicable to Contracts in Excess of $2,000 (Standard Form 19A) in lieu of Provision 10 hereof; (ii) to pay not less than the minimum hourly rates of wages set forth in the specifications; and (iii) to furnish a performance bond in an amount equal to ------ % and a payment bond in an amount equal to 50% of the contract price with surety or sureties acceptable to the Government.

(b) *Contracts estimated to exceed $2,000 but not to exceed $10,000.* Standard Forms 19 and 19A shall be used for these construction contracts executed as a result of formal advertising. Standard Form 22 also may be used. The additional language set forth in paragraph (a) of this section shall be inserted in the bid portion of Standard Form 19 prior to issuance of the invitation.

(c) *Contracts estimated to exceed $10,000.* Standard Forms 20, 21, 22, 23, and 23A shall be used for these construction contracts executed as a result of formal advertising.

§ 16.401–4 Terms, conditions and provisions.

(a) The use of additional contract provisions consistent with those contained in the above forms is authorized, and, where required elsewhere in this subchapter, the use of such additional provisions is mandatory.

(b) Changes or additional provisions inconsistent with those contained in the standard forms shall be incorporated when required by this subchapter, and may be incorporated when authorized by this subchapter, or when approved pursuant to § 1.109 of this subchapter. A copy of any such approval pursuant to § 1.109–2 shall be forwarded by the approving authority to the General Services Administration.

(c) The provisions of paragraphs (a) and (b) of this section shall not be construed to authorize the reinstatement in Standard Form 19 of clauses which appear in Standard Form 23A and which have either been condensed or omitted in the development of Standard Form 19 in the interests of simplification and uniformity. Where such reinstatement is deemed essential, the matter shall be handled as a deviation as provided in § 1.109–3 of this subchapter.

(d) Clause 3 of Standard Form 19 entitled "Disputes" may be altered by inserting in the schedule or in the specifications, the following:

Alterations. As used in Clause 3 of the general provisions "head of the Federal agency" means the "Secretary" of the (insert name of Military Department).

(e) During a period of national emergency, Clause 5(c) of Standard Form 23A may be changed by deleting the word "unforeseeable" and inserting the phrase "other than normal weather" after the

word "causes" where it first appears in the first sentence.

(f) Deletion or modification of provisions in the above forms shall be accomplished in the "Alterations" paragraph of Standard Form 23, or in an "Alterations" paragraph added in the schedule of Standard Form 19, or in the specifications, as may be appropriate.

(g) Whenever Standard Forms 19 and 19A are used for formally advertised contracts the Covenant Against Contingent Fees need not be included.

(h) Pending revision of Standard Form 23A, in order to reflect the amendment of the Copeland (Anti-Kickback) Act, the word "statements" shall be substituted for the word "affidavits" in Clause 24, line 9, of that form.

Subpart E—Special Contract and Order Forms

§ 16.500 Scope of subpart.

This subpart prescribes special forms for procuring certain supplies and services.

§ 16.501 Negotiated utility service contract forms.

This paragraph prescribes forms for the negotiated procurement of utility services which, as used herein, includes only electric, gas, water, sewage, and steam services, except where such services are procured under GSA area contracts as provided in Part 5, Subpart H, of this subchapter.

§ 16.501–1 Estimated annual cost $2,400 or less (DD Form 671).

(a) Utility services shall be procured without a written contract when the supplier's rates are regulated by a Federal, State, or other public regulatory body and when the annual cost of the services to be procured is estimated at the time of initiation of the service to be $2,400 or less: *Provided*, That, such services shall be procured by a written contract whenever—

(1) The supplier requires the execution of a contract or application form;

(2) A connection charge is involved; or

(3) The negotiation and execution of a contract is deemed to be advantageous to the Government.

(b) When utility services are purchased without written contract the citation of procurement authority, and the certification of receipt of service as billed by the supplier, will be accomplished in a simplified manner in accordance with departmental procedures. Rate schedules will not be required with each monthly billing when—

(1) The applicable rate schedule is in the possession of the procuring activity; or

(2) The invoice or billing indicates the total units of service rendered, the rate charged per unit, and the total charge.

(c) When the annual cost of the procurement is $2,400 or less and no connection charge is involved, but a written contract is required pursuant to paragraph (a) of this section, DD Form 671 (Negotiated Utility Service Contract) (Short Form) shall be used. Additional clauses, not inconsistent with those on the form, may be included in accordance with departmental procedures. Deviations from the provisions of the form are authorized when necessary in order to comply with State or local laws and regulations.

(d) Procurement of utility services where a connection charge is involved shall be in accordance with departmental procedures.

§ 16.501–2 Estimated annual cost over $2,400.

When the estimated annual cost of the services to be procured is over $2,400, the procurement shall be in accordance with departmental procedures.

§ 16.502 Negotiated Contract Form for Stevedoring Services (DD Form 674).

§ 16.502–1 General.

DD Form 674 is a Schedule prescribed for use in the procurement of stevedoring services within the United States. In negotiated contracts for stevedoring services, DD Form 674 (Schedule Page) shall be used in conjunction with the appropriate forms described in § 16.202. When contracting for stevedoring services outside the United States, the provisions of the Schedule will be used as a guide only.

§ 16.502–2 Conditions for use.

(a) Since conditions vary at different ports and sometimes within the same port, standard provisions covering all phases of stevedoring operations are impractical. While DD Form 674 will cover most situations adequately, the various provisions of Clause 1 of the Schedule may be deleted, added to, or modified as necessary to meet local conditions. Similarly, the various rate or price schedules in Clause 2 of the Schedule are included merely by way of illustration and may be modified as required. An index may be added if desired.

(b) DD Form 674 covers the loading and discharging of vessels only. If car loading and unloading or other dock and terminal work is to be performed under a stevedoring contract, specifications appropriate for such dock and terminal work should be added as separate items to Clauses 1 and 2 of the Form.

§ 16.502–3 Single job stevedoring services.

DD Form 674 is designed to cover stevedoring services for a period of time, usually a year, and is not required for use with respect to single job stevedoring services, such as the loading or discharging of a single vessel. In such cases, the form should be used as a guide in drafting a contract to meet the requirements of the particular procurement.

§ 16.503 Master Contract for Repair and Alternation of Vessels (DD Forms 731 and 731–1).

§ 16.503–1 General.

DD Form 731 is prescribed to establish in advance the terms upon which a contractor will effect repairs, alterations and additions to vessels under the provisions of job orders issued by contracting activities from time to time. The Master Contract (DD Form 731) shall be entered into with all prospective contractors located within the United States who request ship repair work and who possess the organization and facilities to perform such work satisfactorily. When using Master Contracts in work with prospective contractors located outside of the United States, DD Form 731 shall be used as a guide.

§ 16.503–2 Inviting bids or quotations for job orders.

When a requirement arises for the type of work covered by the Master Contract within the United States, bids or quotations will be solicited from prospective contractors who have previously executed a Master Contract, and also from prospective contractors, who possess the necessary qualifications and agree to execute a Master Contract before issuance of a Job Order. Whenever a prospective contractor is invited to submit a bid or quotation, the contracting officer shall notify the prospective contractor in reasonable detail of (a) the nature of the work to be performed, (b) the date the vessel will be available, and (c) the date the work is to be completed. In the event the prospective contractor is willing and able to perform the work, he shall be afforded an opportunity to inspect the work to be accomplished, and then he shall submit a bid or quotation for the performance of the work in accordance with the invitation for bids or request for quotations. If the contracting officer requests prospective contractors to negotiate, he shall also request a breakdown of the price quoted indicating the estimated cost of (1) direct labor, (2) material, (3) overhead, (4) any amount included for contingencies and profit, and (5) such other information as the contracting officer may consider necessary.

§ 16.503–3 Issuance of Job Order (DD Form 731–1).

After the receipt and evaluation of bids or quotations and selection of the contractor, the price for the work and other pertinent data shall be set forth in a Job Order (DD Form 731–1). The Job Order, by its terms, is subject to the provisions of the Master Contract. When the procurement has been formally advertised, issuance of a Job Order, signed by the Contracting Officer only, constitutes an award. When the procurement of the services has been negotiated the Job Order must also be signed by the contractor, and returned to the Contracting Officer.

§ 16.503–4 Emergency work required prior to issuance of a job order.

In the following circumstances, the Contracting Officer, without inviting bids or requesting quotations, may issue a written order for work to a contractor who has executed a Master Ship Repair contract: (a) when a vessel, its cargo, or stores would be endangered by delay in the performance of necessary repair work, or (b) when military necessity requires immediate work on a vessel. Contractors who sign the Master Contract

agree to perform the work required by such written orders within their capabilities. As soon as practical after the issuance of such written orders, the parties are required by the Master Contract to negotiate a price for the work. When agreement is reached upon a price, the Contracting Officer will issue a Job Order covering the work. The Master Contract provides for a procedure to resolve disputed questions with respect to price. However, the contractor is required to proceed diligently with the work pending a decision upon such disputes.

§ 16.503–5 Repair costs not readily ascertainable.

If the nature of any repairs is such that their extent and probable cost are not readily ascertainable, the Contracting Officer may issue a Job Order, on a negotiated or formally advertised basis, to determine the nature and extent of required repairs. The Job Order shall also provide that upon such determination, the contractor, if requested by the Contracting Officer, shall negotiate prices for the performance of such work as the Contracting Officer may deem necessary to accomplish the repairs. The prices so agreed upon shall be set forth in an amendment to the Job Order.

§ 16.503–6 Modification of master contracts.

(a) Since master contracts prescribe the terms and conditions under which contractors submit bids and competitive quotations for vessel repair work, it is essential that the provisions of all outstanding master contracts be kept uniform. It is also necessary that master contracts be kept up to date and reflect changes in statutes, executive orders, and procurement regulations applicable to vessel repair work. The DD Form 731 will be revised periodically, not more frequently than annually, to incorporate all changes made necessary by this subchapter revisions unless revision is required by statute or executive order. All outstanding master contracts shall be replaced using the latest revised form, effective as to all job orders issued on or after 60 days after the promulgation of such revision.

(b) To minimize interim amendments to Master Contracts, revisions to this subchapter changing clauses in the Master Contract form will provide appropriate direction with respect to any required amendments to Master Contracts. To the extent possible, amendments will be required only in matters resulting from changes in statutes or executive orders.

§ 16.504 Order for Paid Advertisements (Standard Forms 1143 and 1143a).

The following forms will be used to order and effect payment for advertisements in newspapers (see § 1.1005):

(a) Standard Form 1143, Advertising Order (original) (face) Public Voucher for Advertising (original) (reverse); and

(b) Standard Form 1143a, Advertising Order (memorandum) (face) Public Voucher for Advertising (memorandum) (reverse).

§ 16.505 Novation agreements.

§ 16.505–1 *Scope of section.* This section prescribes the policy and procedures for recognition of (a) a successor in interest to Government contracts when such interests are acquired incidental to a transfer of all the assets of a contractor or such part of its assets as is involved in the performance of the contracts or (b) a change of name of a contractor.

§ 16.505–2 Agreements to recognize a successor in interest.

(a) The transfer of a Government contract is prohibited by law (41 U.S.C. 15). However, the Government may recognize a third party as the successor in interest to a Government contract where the third party's interest is incidental to the transfer of all the assets of the contractor, or all that part of the contractor's assets involved in the performance of the contract. Examples include, but are not limited to:

(1) Sale of such assets;

(2) Transfer of such assets pursuant to merger or consolidation of corporations; and

(3) Incorporation of a proprietorship or partnership.

(b) Where it is consistent with the Government's interest to recognize a successor in interest to a Government contract, the Department concerned shall execute an agreement with the transferor and the transferee, which shall ordinarily provide in part that:

(1) The transferee assumes all the transferor's obligations under the contract;

(2) The transferor waives all rights under the contract as against the Government;

(3) The transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted in lieu of such guarantee); and

(4) Nothing in the agreement shall relieve the transferor or the transferee from compliance with any Federal law. A form for such an agreement for use when the transferor and transferee are corporations, and all the assets of the transferor are transferred, is set forth below. This form may be adapted to fit specific cases, and may be used as a guide in preparing similar agreements for use in other situations.

AGREEMENT (FEB. 1959)

This Agreement, entered into as of _____, 19__, by and between the ABC Corporation, a corporation duly organized and existing under the laws of the State of _____ with its principal office in the City of _____ (hereinafter referred to as the "Transferor"); the XYZ Corporation [formerly known as the LMN Corporation], a corporation duly organized and existing under the laws of the State of _____ with its principal office in the City of _____ (hereinafter referred to as the "Transferee") and the United States of America (hereinafter referred to as the "Government").

WITNESSETH:

Whereas, the Government, represented by various Contracting Officers of the Department of the _____, has entered into certain contracts, letter contracts and purchase orders with the Transferor, [namely: _____] or [as set forth in the attached list marked "Exhibit A" to this Agreement and herein incorporated by reference;] and the term "the contracts" as hereinafter used means the above contracts, letter contracts, and purchase orders, and all other contracts, letter contracts and purchase orders, including amendments and change orders thereto, heretofore made between the Government, represented by various Contracting Officers of the Department of the _____, and the Transferor (whether or not performance and payment have been completed and releases executed, if the Government or the Transferor has any remaining rights, duties or obligations thereunder), and including amendments and change orders thereto hereafter made between the Government and the Transferee;

Whereas, as of _____, 19__, the Transferor assigned, conveyed and transferred to the Transferee all the assets of the Transferor by virtue of a [term descriptive of the legal transaction involved] between the Transferor and the Transferee;

Whereas, the Transferee, by virtue of said assignment, conveyance and transfer, has acquired all the assets of the Transferor;

Whereas, by virtue of said assignment, conveyance and transfer, the Transferee has assumed all the duties, obligations and liabilities of the Transferor under the Contracts;

Whereas, the Transferee is in a position fully to perform the Contracts, and such duties and obligations as may exist under the Contracts;

Whereas, it is consistent with the Government's interest to recognize the Transferee as the successor party to the Contracts;

Whereas, there has been filed with the Government evidence of said assignment, conveyance or transfer [add if desired, "in the form of a certified copy of the list of the documents required by § 16.505–2 (c) below"];

[Where a change of name is also involved, such as a prior or concurrent change of name of the transferee, an appropriate recital shall be used; for example:

Whereas there has been filed with the Government a certificate dated _____, 19__, signed by the Secretary of State of the State of _____, to the effect that the corporate name of LMN Corporation was changed to XYZ Corporation on _____, 19__];

Now therefore, in consideration of the premises, the parties hereto agree as follows:

1. The Transferor hereby confirms said assignment, conveyance and transfer to the Transferee, and does hereby release and discharge the Government from, and does hereby waive, any and all claims, demands, and rights against the Government which it now has or may hereafter have in connection with the Contracts.

2. The Transferee hereby assumes, agrees to be bound by, and undertakes to perform each and every one of the terms, covenants, and conditions contained in the Contracts. The Transferee further assumes all obligations and liabilities of, and all claims and demands against, the Transferor under the Contracts, in all respects as if the Transferee were the original party to the Contracts.

3. The Transferee hereby ratifies and confirms all actions heretofore taken by the Transferor with respect to the Contracts with the same force and effect as if the action had been taken by the Transferee.

4. The Government hereby recognizes the Transferee as the Transferor's successor in interest in and to the Contracts. The Transferee hereby becomes entitled to all right, title, and interest of the Transferor in and to the Contracts in all respects as if the Transferee were the original party to the Contracts. The term "Contractor" as used in the Contracts shall be deemed to refer to the Transferee rather than to the Transferor.

5. Except as expressly provided herein, nothing in this Agreement shall be construed as a waiver of any rights of the Government against the Transferor.

6. Notwithstanding the foregoing provisions, all payments and reimbursements heretofore made by the Government to the Transferor and all other action heretofore taken by the Government, pursuant to its obligations under any of the Contracts, shall be deemed to have discharged pro tanto the Government's obligations under the Contracts. All payments and reimbursements made by the Government after the date of this Agreement in the name of or to the Transferor shall have the same force and effect as if made to said Transferee and shall constitute a complete discharge of the Government's obligations under the Contracts, to the extent of the amounts so paid or reimbursed.

7. The Transferor and the Transferee hereby agree that the Government shall not be obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes or other expenses, or any increases therein, directly or indirectly arising out of or resulting from (i) said assignment, conveyance and transfer, or (ii) this Agreement, other than those which the Government, in the absence of said assignment, conveyance and transfer, or this Agreement, would have been obligated to pay or reimburse under the terms of the Contracts.

8. The Transferor hereby guarantees payment of all liabilities and the performance of all obligations which the Transferee (i) assumes under this Agreement, or (ii) may hereafter undertake under the Contracts as they may hereafter be amended or modified; and the Transferor hereby waives notice of and consent to any such amendment or modification.

9. Except as herein modified, the Contracts shall remain in full force and effect.

In Witness whereof, each of the parties hereto has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA

By ----------

Title ----------

(Corporate Seal)

ABC CORPORATION

By ----------

Title ----------

(Corporate Seal)

XYZ CORPORATION

By ----------

Title ----------

CERTIFICATE

I, ----------, certify that I am the Secretary of ABC Corporation, named above; that ----------, who signed this Agreement on behalf of said corporation, was then ---------- of said corporation; and that this Agreement was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

Witness my hand and seal of said corporation this ---------- day of ----------, 19--.

By ----------

(Corporate Seal)

CERTIFICATE

I, ----------, certify that I am the Secretary of XYZ Corporation, named above; that ----------, who signed this Agreement on behalf of said corporation, was then ---------- of said corporation; and that this Agreement was duly signed for and in behalf of said corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of said corporation this ---------- day of ----------, 19--.

By ----------

(Corporate Seal)

(c) Prior to the execution of such agreement one copy of each of the following, as applicable, shall be deposited by the contractor with the Department concerned:

(1) A properly authenticated copy of the instrument by which the transfer of assets was effected, as for example, a bill of sale, certificate of merger, indenture of transfer, or decree of court;

(2) A list of all contracts, letter contracts, and purchase orders, which have not been finally settled between the Department concerned and the transferor, showing the contract number, the name and address of the respective procuring activities involved; and, if determined necessary, the total dollar value of each contract as amended, the type of contract involved, and the balance remaining unpaid;

(3) A certified copy of the resolutions of the Boards of Directors of the corporate parties authorizing the transfer of assets;

(4) A certified copy of the minutes of any stockholders meetings of the corporate parties necessary to approve the transfer of assets;

(5) A properly authenticated copy of the certificate and articles of incorporation of the transferee if such corporation was formed for the purpose of receiving the assets involved in the performance of the Government contracts;

(6) An opinion of counsel for the contractor parties that the transfer was properly effected in accordance with applicable law; and to the extent necessary;

(7) Evidence of the capability of the transferee to perform the contracts;

(8) Balance sheets of the transferor and the transferee as of dates immediately prior to and after the transfer of assets; and

(9) Evidence of security clearance requirements.

(10) Consent of sureties on all contracts listed under subparagraph (2) of this paragraph where bonds were required.

§ 16.505–3 Agreement to recognize change of name of contractor.

(a) Where only a change of name is involved, so that the rights and obligations of the parties remain unaffected, an agreement between the Department concerned and the contractor shall be executed effecting the amendment of all existing contracts between the parties so as to reflect the contractor's change of name. A form for such an agreement, which shall be adapted for specific cases, is set forth below.

AGREEMENT (MAR. 1956)

This agreement, entered into as of ----------, 19--, by and between the ABC Corporation [formerly the XYZ Corporation and hereinafter sometimes referred to as the "Contractor"], a corporation duly organized and existing under the laws of the State of ----------, and the United States of America, represented by the Department of the ----------, (hereinafter referred to as the "Government").

WITNESSETH:

Whereas the Government, represented by various Contracting Officers of the Department of the ----------, has entered into certain contracts, letter contracts and purchase orders with the XYZ Corporation, [namely:] or [as set forth in the attached list marked "Exhibit A" to this Agreement and herein incorporated by reference;] and the term "the Contracts" as hereinafter used means the above contracts, letter contracts, and purchase orders, and all other contracts, letter contracts, and purchase orders, including amendments and change orders thereto, entered into between the Government, represented by various Contracting Officers of the Department of the ----------, and the Contractor (whether or not performance and payment have been completed and releases executed, if the Government or the Contractor has any remaining rights, duties, or obligations thereunder);

Whereas the XYZ Corporation, by an amendment to its certificate of incorporation, dated ----------, 19--, has changed its corporate name to the ABC Corporation;

Whereas a change of corporate name only is accomplished by said amendment, so that rights and obligations of the Government and of the Contractor under the Contracts are unaffected by said change; and

Whereas there has been filed with the Government documentary evidence of said change in corporate name;

Now therefore, in consideration of the premises, the parties hereto agree that the Contracts covered by this Agreement are hereby amended by deleting therefrom the name "XYZ Corporation" wherever it appears in the Contracts and substituting therefor the name "ABC Corporation."

In witness whereof, each of the parties hereto has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA

By ----------

Title ----------

(Corporate Seal)

ABC CORPORATION

By ----------

Title ----------

CERTIFICATE

I, ----------, certify that I am the Secretary of ABC Corporation, named above; that ----------, who signed this Agreement on behalf of said corporation, was then ---------- of said corporation; and that this Agreement was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

Witness my hand and the seal of said corporation this ------ day of ----------, 19--.

By ----------

(Corporate Seal)

(b) Prior to the execution of such agreement, one copy of each of the following shall be deposited by the contractor with the Department concerned:

(1) A copy of the instrument by which the change of name was effected, authenticated by a proper official of the State having jurisdiction;

(2) An opinion of counsel for the contractor that the change of name was properly effected in accordance with applicable law; and

(3) A list of all contracts, letter contracts, and purchase orders, which have not been finally settled between the Department concerned and the contractor, showing contract number, and the name and address of the respective procuring activities involved.

§ 16.506 Communication Service Authorization (DD Form 428).

DD Form 428 shall be used in accordance with Departmental procedures as an order for facilities and services under contracts for telephone and telegraph communications facilities and services.

Subpart F—Forms for Coordinated Procurement

§ 16.600 Scope of subpart.

This subpart prescribes forms to be used by a requiring Military Department to request that supplies be furnished by another Military Department or Agency in accordance with the provisions of Subpart K, Part 5 of this subchapter.

§ 16.601 Military Interdepartmental Purchase Request (DD Form 448, 448–1).

When an assignment of procurement responsibility has been made by the Secretary of Defense, DD Form 448, Military Interdepartmental Purchase Request (MIPR), shall be used by the requiring Military Departments to—

(a) Request the procurement of supplies by the procuring Department or agency; and

(b) Permit the procuring Department or Agency to authorize manufacture of the necessary supplies.

DD Form 448 is authorized for use in effecting other types of coordinated procurement pursuant to Subpart K, Part 5 of this subchapter. When a continuation sheet is necessary, DD Form 448–1 (MIPR Continuation Sheet) shall be used.

§ 16.602 Requisition for Coal, Coke, or Briquettes (DD Form 416).

DD Form 416 shall be used in lieu of DD Form 448 by the requiring Departments to request coal, coke, or fuel briquettes from the Procuring Department.

Subpart G—Contract Termination Forms

§ 16.700 Scope of subpart.

This subpart prescribes forms for use in connection with terminated contracts (see Part 8 of this chapter).

§ 16.701 Notices of termination.

There are no Department of Defense forms prescribed for use in issuing termination notices. However, § 8.801 sets forth texts of telegraphic and letter notices of termination which may be used.

§ 16.702 Settlement proposal forms.

Although the forms prescribed below are deisgned for use by prime contractors, they are equally suitable for use by subcontractors.

§ 16.702–1 Settlement proposal: inventory basis (DD Form 540).

DD Form 540 is prescribed for use by contractors in presenting claims resulting from the termination of fixed-price contracts when such claims are computed on the inventory basis. See § 8.802–1 of this chapter.

§ 16.702–2 Settlement proposal; total cost basis (DD Form 541).

DD Form 541 is prescribed for use by contractors in presenting claims resulting from the termination of either fixed-price or cost-reimbursement type contracts when such claims are computed on the total cost basis. See § 8.802–2 of this chapter.

§ 16.702–3 Settlement proposal for cost-reimbursement type contracts (DD Form 547).

DD Form 547 is prescribed for use by contractors in submitting claims resulting from the termination of cost-reimbursement type contracts. (See § 8.803 of this chapter.)

§ 16.702–4 Settlement proposal; short form (DD Form 831).

DD Form 831 is prescribed for use by contractors in submitting claims resulting from the termination of fixed-price contracts when the total claim is less than $1,000. (See § 8.802–3 of this chapter.)

§ 16.702–5 Inventory schedules (DD Forms 542, 543, 544, 545, and 832).

(a) The following forms are prescribed for use by contractors to support settlement proposals submitted on DD Forms 540, 541, or 547:

(1) DD Form 542 (Inventory Schedule A—Metals in Mill Product Form) and DD Form 542c (Continuation Sheet). See § 8.802–4 of this chapter.

(2) DD Form 543 (Inventory Schedule B—Raw Materials) and DD Form 543c (Continuation Sheet). See § 8.802–5 of this chapter.

(3) DD Form 544 (Inventory Schedule C—Work in Process) and DD Form 544c (Continuation Sheet). See § 8.802–6 of this chapter; and

(4) DD Form 545 (Inventory Schedule D—Dies, Jigs, Fixtures, etc., and Special Tools) and DD Form 545c (Continuation Sheet). See § 8.802–7 of this chapter.

In addition, the inventory schedule forms may be used for reporting inventory in connection with adjustments under the Changes clause and inventory excess to completed contracts.

(b) DD Form 832 (Termination Inventory Schedule E—Short Form) is prescribed for use by contractors to support settlement proposals submitted on DD Form 831. See § 8.802–8 of this chapter.

§ 16.702–6 Schedule of accounting information (DD Form 546).

DD Form 546 is prescribed for use by contractors in connection with settlement proposals (see § 8.307–1 of this chapter). See § 8.802–9 of this chapter.

§ 16.703 Application for partial payment (DD Form 548).

DD Form 548 is prescribed for use by contractors when applying for partial payments (see § 8.212–1(a) of this chapter). See § 8.802–10 of this chapter.

§ 16.704 Notice of audit status date (DD Form 547s).

DD Form 547s is prescribed for use by disbursing officers to fix the audit status date in accordance with § 8.405–4 of this chapter. See § 8.804 of this chapter.

§ 16.705 Forms of settlement agreement.

There are no Department of Defense forms prescribed for settlement agreements. However, appropriate approved texts for settlement agreements are set forth in § 8.806 of this chapter.

§ 16.706 Instructions for use of termination forms.

DD Form 1114 consists of instructions for the use of contract termination settlement and inventory schedule forms. See § 8.807 of this chapter.

Subpart H—Miscellaneous Forms

§ 16.800 Scope of subpart.

This subpart prescribes miscellaneous forms other than contract forms, for use in connection with the procurement of supplies and services.

§ 16.801 Statement and Certificate of Award (Standard Form 1036).

Standard Form 1036 (Statement and Certificate of Award), which briefly recites the circumstances relating to contract awards, shall be prepared and executed by the Contracting Officer in connection with every contract entered into after formal advertising, as required by § 2.407–7 of this subchapter, and shall be attached to the copy of the contract which is forwarded to the General Accounting Office.

§ 16.802 Statement on Contingent Fees (Standard Form 119).

Standard Form 119 is prescribed for use in accordance with §§ 1.506 through 1.509 of this subchapter.

§ 16.803 Compliance with labor laws, regulations and clauses.

§ 16.803–1 Construction contracts.

(a) Department of Labor Form DB–11 (Request for Determination) shall be used in accordance with the provisions of § 12.404–2 of this subchapter, for the submission of requests for the determination of wage rates by the Secretary of Labor.

(b) Standard Form 1093 (Schedule of Deductions from Payments to Contractors) shall be used in accordance with the provisions of § 12.404–9 of this subchapter, to report deductions against payment vouchers of contractors on account of failure to comply with labor laws, regulations and clauses.

(c) (1) The weekly payroll statement required by the contract clauses prescribed by § 12.403–1 or § 12.403–4 of this subchapter, should be in one of the following forms:

(i) "Payroll (For Contractor's Optional Use)," Form Sol. 184 (4–30–59) U.S. Department of Labor.

(ii) "Contractor's Weekly Payroll Statement," DD Form 879.

(iii) The contractor's own combined payroll-statement form, provided the statement is reproduced in exactly the language of Form Sol. 184 or DD Form

879 and the signer certifies on the statement: "The language of this statement is exactly the language of ----------."

(2) When the contract clauses prescribed by § 12.403–2 of this subchapter are applicable, contractors shall submit the weekly payroll statement but should omit or delete paragraphs (2) and (3).

(3) A supply of DD Forms 879 may be furnished to the contractors for their use. Forms Sol. 184 may be purchased from the Government Printing Office.

§ 16.803–2 Supply contracts.

(a) Department of Labor Form PC–12 (Rev. 3/49), a form letter explaining the Walsh-Healey Act, shall be furnished to the contractor in accordance with the provisions of § 12.603 of this subchapter.

(b) Department of Labor Form PC–13 (Rev. 1/50), is a poster required to be furnished to the contractor in accordance with the provisions of § 12.603 of this subchapter.

(c) DD Form 350 shall be used in accordance with the provisions of § 12.603 of this subchapter to furnish the Department of Labor with certain information in lieu of utilizing the Department of Labor Form PC–1 as required by administrative regulations of the Secretary of Labor.

§ 16.804 U.S. Government Tax Exemption Certificate (Standard Form 1094—Revised).

§ 16.804–1 Conditions for use.

Except when a different form is required by a cognizant state or local tax jurisdiction, Standard For 1094—Revised is prescribed for use as a certificate of exemption from State and local taxes when exemption is authorized by contract provisions and Departmental procedures. The form shall not be used as a certificate of exemption from Federal taxes.

§ 16.804–2 Supply of forms.

Supplies of Standard Form 1094—Revised will be obtained in accordance with Departmental procedures.

§ 16.805 Bond forms.

The bond forms listed below are available for use in accordance with departmental procedures. (See Part 10, Subparts A and B, of this subchapter.)

(a) Bid Bond (Standard Form 24).

(b) Annual Bid Bond (Standard Form 34).

(c) Performance Bond (Standard Form 25).

(d) Payment Bond (Standard Form 25A).

(e) Performance Bond (Corporate Co-Surety) (Standard Form 27).

(f) Payment Bond (Corporate Co-Surety) (Standard Form 27A).

(g) Continuation Sheet (Corporate Co-Surety) (Standard Form 27B).

(h) Affidavit of Individual Surety (Standard Form 28).

(i) Annual Performance Bond (Standard Form 35).

§ 16.806 Royalty report form (DD Form 783).

DD Form 783 is approved for use by contractors in making reports as required by the Reporting of Royalties (Foreign) clause of § 9.110 of this chapter. While it is preferred that contractors use DD Form 783 (and contractor reproduction of the form is authorized), the contractor may submit the royalty information in such other form as is considered desirable by the contractor: *Provided,* Such other form contains all of the information required by the reporting of royalties clause of the contract.

§ 16.807 Individual procurement action report (DD Form 350).

DD Form 350 is designed to provide essential procurement records and statistics through a single uniform reporting program as a basis for required recurring and special reports to the President, the Congress, the Office of Civil and Defense Mobilization, the General Accounting Office, the Renegotiation Board, the Small Business Administration, and other Federal agencies. Some of these requirements are referred to in §§ 1.302–2, 3.103, 3.211–4 and 3.216–4 of this subchapter. It also provides the Departments with a wide variety of significant data for procurement policy and management control purposes, and provides the Department of Labor with data required in connection with the administration of the Walsh-Healey Public Contracts Act.

§ 16.808 Duty Free Entry Certificate (Customs Form 7501).

[Reserved]

§ 16.809 Report of Inventions and Subcontracts (DD Form 882).

Form 882 is approved for optional use by contractors in reporting information required by paragraph (c)(ii), (c)(iii), and (h) of the Patent Rights clause set forth in § 9.107–2 of this subchapter.

§ 16.810 Bidders Mailing List Application (Standard Form 129) and Bidders Mailing List Application Supplement (DD Form 558–1)

§ 16.810–1 General.

Standard Form 129 shall be used in connection with the establishment and maintenance of bidders' lists as prescribed in § 2.205 of this subchapter. Supplemental information, where required, may be obtained by using DD Form 558–1 (Bidders' Mailing List Application Supplement).

§ 16.810–2 Conditions for use.

Additions to the bidders mailing list of a purchasing activity shall be made only after considering a properly completed application on Standard Form 129. The application shall be submitted and signed by the supplier (the manufacturer or regular dealer), as distinguished from an agent of the supplier. However, suppliers are not precluded from designating, in the Standard Form 129, their agents to receive Invitations for Bids and Requests for Proposals.

§ 16.810–3 Item listings for information of bidders.

In order to enable suppliers to indicate readily the items on which they will generally desire to submit bids or proposals, there shall be attached to Standard Form 129 forwarded to suppliers for completion, a list of items, or item groups, or an index to such listing of the items, procured by the purchasing activity maintaining the list, which are considered applicable to the supplier's type of business.

§ 16.811 Security requirements check list (DD Form 254).

The "Military Security Requirements" clause (§§ 7.104–12 and 7.204–12 of this subchapter) is included in all contracts which are classified "Confidential" including "Confidential—Modified Handling Authorized" or higher and in any other contracts the performance of which will require access to such classified information or material. Except where a letter or other written notice of classification is authorized by § 7.104–12, contracting officers shall inform contractors of the security classifications assigned to the various documents, materials, tasks, subcontracts, and components of classified contracts by using DD Form 254. Instructions for preparation are included in the form. The contracting officer is responsible for preparation of the form and shall insure that it is physically attached to the copies of the contract forwarded to the contractor, the material inspector, the security office of the cognizant Military Department of the facility receiving the prime contract or a subcontract thereunder, and such other interested agencies as may be determined by the Military Departments.

§ 16.812 Release and assignment forms.

(a) The forms set forth below are approved for use in complying with the assignment and release provisions of paragraph (f) of the compensation clauses for cost-plus-fixed-fee and cost-plus-incentive-fee contracts set forth in § 7.203–4 (a) and (b) of this subchapter. Forms differing from the approved forms may be used if the contracting officer determines that such forms meet the applicable requirements of the clause. Checks received by Army and Air Force contracting officers pursuant to paragraph 2 of the assignments in paragraphs (d) and (e) of this section shall be forwarded to the finance officer named in the contract.

(b) Set forth below is an approved form for the contractor's release required by paragraph (f) of the clauses in § 7.203–4 (a) and (b) of this subchapter.

CONTRACTOR'S RELEASE (JULY 1956)

Contract No. ------

Pursuant to the terms of Contract No. ------ and in consideration of the sum of -------- Dollars ($------) which has been or is to be paid under the said contract to ------ ---------- (herein-
(Contractor's name and address)
after called the Contractor) or its assignees, if any, the Contractor, upon payment of the said sum by the United States of America (hereinafter called the Government), does remise, release, and discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract, except:

1. Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor, as follows:

---

2. Claims, together with reasonable expenses incidental thereto, based upon the liabilities of the Contractor to third parties arising out of the performance of the said contract, which are not known to the Contractor on the date of the execution of this release and of which the Contractor gives notice in writing to the Contracting Officer within the period specified in the said contract.

3. Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of the said contract relating to patents.

The Contractor agrees, in connection with patent matters and with claims which are not released as set forth above, that it will comply with all of the provisions of the said contract, including without limitation those provisions relating to notification to the Contracting Officer and relating to the defense or prosecution of litigation.

In witness whereof, this release has been executed this ------ day of ---------- 19 ---.

(Contractor)

By ----------

Title ----------

Witnesses:

NOTE: In the case of a corporation, witnesses are not required, but the certificate below must be completed.

CERTIFICATE

I, ----------, certify that I am the ------

(Official title)

of the corporation named as Contractor in the foregoing release; that ---------- who signed said release on behalf of the Contractor was then ---------- of said cor-
(Official title)

poration; that said release was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

[CORPORATE SEAL]

The following sentence shall be added to the final paragraph of the above release form when the related contract provides for reimbursement on a cost-plus-incentive-fee basis:

The Contractor further agrees that payments on account of claims not released as set forth above shall be subject to adjustment in accordance with paragraph (i) of the clause of the contract entitled "Allowable Cost, Incentive Fee, and Payment."

(c) Set forth below is an approved form for the assignee's release required by paragraph (f) of the clauses in § 7.203–4 (a) and (b) of this subchapter.

ASSIGNEE'S RELEASE (MAY 1958)

Contract No. ------

Pursuant to the terms of Contract No. ------ and in consideration of the sum of ------ Dollars ($------) which has been or is to be paid under the said contract by the United States of America (hereinafter called the Government) to the Contractor or its assignees, the ----------.
(Assignee's name and address)

(i) A corporation organized and existing under the laws of the State of ----------,

(ii) A partnership consisting of ----------,

(iii) An individual trading as ----------,

(hereinafter called the Assignee), upon receipt of that part of the said sum due under its assignment, does remise, release and discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract and assignment, except:

1. Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor, as follows:

2. Claims, together with reasonable expenses incidental thereto, based upon the liabilities of the Contractor to third parties arising out of the performance of the said contract, which are not known to the Contractor or Assignee on the date of the execution of this release and of which the Contractor or Assignee gives notice in writing to the Contracting Officer within the period specified in the said contract.

3. Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of the said contract relating to patents.

The Assignee agrees, in connection with claims which are not released as set forth above, that final payment under the said contract does not modify the requirements and limitations imposed on the Contractor or Assignee by the contract or the assignment, including without limitation those provisions relating to notification to the Contracting Officer and relating to the defense or prosecution of litigation.

In witness whereof, this release has been executed this ------ day of ---------- 19---.

(Assignee)

By ----------

Title ----------

Witnesses:

NOTE: In the case of a corporation, witnesses are not required, but the certificate below must be completed.

CERTIFICATE

I, ----------, certify that I am the ------

(Official title)

of the corporation named as Assignee in the foregoing release; that ---------- who signed said release on behalf of the Assignee was then ----------
(Official title)

of said corporation; that said release was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

[CORPORATE SEAL]

The following sentence shall be added to the final paragraph of the above release form when the related contract provides for reimbursement on a cost-plus-incentive-fee basis:

The Assignee further agrees that payments on account of claims not released as set forth above shall be subject to adjustment in accordance with paragraph (i) of the clause of the contract entitled "Allowable Cost, Incentive Fee and Payment."

(d) Set forth below is an approved form for the contractor's assignment of refunds, rebates, credits, and other amounts, required by paragraph (f) of the clauses in § 7.203–4 (a) and (b) of this subchapter.

CONTRACTOR'S ASSIGNMENT OF REFUNDS, REBATES, CREDITS, AND OTHER AMOUNTS (MAY 1958)

Contract No. ------

Pursuant to the terms of Contract No. ------ and in consideration of the reimbursement of costs and payment of fee, as provided in the said contract and any assignment thereunder, the ----------

---
(Contractor's name and address)

(hereinafter called the Contractor) does hereby:

1. Assign, transfer, set over and release to the United States of America (hereinafter called the Government), all right, title and interest to all refunds, rebates, credits, and other amounts (including any interest thereon) arising out of the performance of the said contract, together with all the rights of action accrued or which may hereafter accrue thereunder.

2. Agree to take whatever action may be necessary to effect prompt collection of all refunds, rebates, credits, and other amounts (including any interest thereon) due or which may become due, and to promptly forward to the (------*) checks (made payable to the Treasurer of the United States) for any proceeds so collected. The reasonable costs of any such action to effect collection shall constitute allowable costs when approved by the Contracting Officer as stated in the said contract and may be applied to reduce any amounts otherwise payable to the Government under the terms hereof.

3. Agree to cooperate fully with the Government as to any claim or suit in connection with refunds, rebates, credits, or other amounts due (including any interest thereon); to execute any protest, pleading, application, power of attorney, or other papers in connection therewith; and to permit the Government to represent it at any hearing, trial, or other proceeding, arising out of such claim or suit.

In witness whereof, this assignment has been executed this ------ day of ---------- 19---.

(Contractor)

By ----------

Title ----------

Witnesses:

NOTE: In the case of a corporation, witnesses are not required, but the following certificate must be completed.

CERTIFICATE

I, ----------, certify that
(Official title)

I am the ---------- of the corporation named as Contractor in the foregoing assignment; ---------- who signed said assignment on behalf of the Contractor was then ---------- of said corporation;
(Official title)

that said assignment was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

[CORPORATE SEAL]

In the blank space designated by an asterisk (------*) in the foregoing form, insert in contracts of the Departments of the Army and Air Force the words

"Contracting Officer"; in contracts of the Department of the Navy, insert "Navy Department, U. S. Navy Regional Accounts Office, Washington 25, D. C."; in contracts of the Marine Corps, insert "Disbursing Officer, Special Accounts Section (Code CDG) Hqs. Marine Corps, Washington 25, D. C."

(e) Set forth below is an approved form for the assignee's assignment of refunds, rebates, credits, and other amounts required by paragraph (f) of the clauses in § 7.203–4 (a) and (b) of this subchapter.

ASSIGNEE'S ASSIGNMENT OF REFUNDS, REBATES, CREDITS, AND OTHER AMOUNTS (MAY 1958)

Contract No. ------

Pursuant to the terms of Contract No. ------ and in consideration of the reimbursement of costs and payment of fee, as provided in the said contract and assignment thereunder, the ----------

---

(Assignee's name and address)

(i) A corporation organized and existing under the laws of the State of ----------,

(ii) A partnership consisting of ----------,

(iii) An individual trading as ----------,

(hereinafter called the Assignee), does hereby assign, transfer, set over, and release to the United States of America, all right, title, and interest to all refunds, rebates, credits, and other amounts (including any interest thereon) arising out of the performance of the said contract, together with all the rights of action accrued or which may hereafter accrue thereunder.

In witness whereof, this assignment has been executed this ------ day of ---------- 19--.

(Assignee)

By ----------

Title ----------

Witnesses:

NOTE: In the case of a corporation, witnesses are not required, but the following certificate must be completed.

CERTIFICATE

I, ----------, certify that I am

(Official title)

the ---------- of the corporation named as Assignee in the foregoing assignment; that ---------- who signed said assignment on behalf of the Assignee was then ---------- of said corporation;

(Official title)

that said assignment was duly signed for and in behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

[CORPORATE SEAL]

§ 16.813 Change order price analysis (DD Form 1107).

§ 16.813–1 General.

DD Form 1107 (Change Order Price Analysis) provides a standard format for the submission of cost data by contractors when such data are required for the pricing of change orders under fixed-price or for cost-reimbursement type contracts. Contractor reproduction of the form is authorized.

§ 16.813–2 Conditions for use.

The contracting officer shall request the contractor to submit data required for the pricing of change orders on DD Form 1107, except where the contractor and the contracting officer have agreed otherwise.

§ 16.813–3 Forms superseded.

This Form supersedes Departmental forms currently used solely for this purpose effective when existing stocks of Departmental forms are exhausted or 1 January 1958, whichever is earlier.

§ 16.814 Experience data forms.

§ 16.814–1 Architect-engineer experience data (DD Form 1071).

This form is designed to assure the uniform submission of experience and organizational data by architect-engineer firms and shall be used in lieu of any corresponding Departmental form.

§ 16.814–2 Construction contractor experience data (DD Form 1072).

This form is designed to assure the uniform submission of experience and organizational data by construction contractors and shall be used in lieu of any corresponding Departmental form.

§ 16.815 Contract modification forms.

Sections 16.815—16.815–2 prescribe forms for the modification of contracts for the procurement of supplies or services.

§ 16.815–1 Change Order (DD Form 1319).

This form shall be used for any change order issued pursuant to the Changes clause of a contract and for any other contract modification for which the contractor's agreement is clearly not required. Examples of the latter include the correction of typographical mistakes, changes in the paying office, and changes in accounting and appropriation data.

§ 16.815–2 Supplemental Agreement (DD Form 1320).

This form shall be used for supplemental agreements, as defined in § 1.201–19 of this chapter.

PART 17—EXTRAORDINARY CONTRACTUAL ACTIONS TO FACILITATE THE NATIONAL DEFENSE

Sec.
17.000 Scope of part.
17.001 Approval of regulations and deviations.

Subpart A—General

17.101 Previous authority.
17.102 General policy.
17.103 Types of actions.
17.104 Definitions.

Subpart B—Requests for Contractual Adjustment

17.200 Scope.
17.201 Authority of the Secretaries.
17.202 Contract Adjustment Boards.
17.202–1 Organization.
17.202–2 Authority.
17.203 Authority of other officers and officials.
17.204 Standards for deciding cases.
17.204–1 General.
17.204–2 Amendments without consideration.
17.204–3 Mistakes.
17.204–4 Informal commitments.
17.205 Limitations upon exercise of authority.
17.205–1 General limitations.
17.205–2 Additional limitations upon authority below Secretarial level.
17.206 Contractual requirements.
17.207 Submission of requests by contractors.
17.207–1 Filing requests.
17.207–2 Form of requests by contractors.
17.207–3 Records.
17.207–4 Facts and evidence.
17.208 Processing cases.
17.208–1 Investigation.
17.208–2 Disposition below secretarial level.
17.208–3 Submission of cases to the Contract Adjustment Board.
17.208–4 Processing by Contract Adjustment Boards.
17.208–5 Maintenance of records.
17.208–6 Interdepartmental coordination.

Subpart C—Residual Powers

17.300 Scope.
17.301 Delegations of authority.
17.302 Standards for using residual powers.
17.303 Procedures.
17.304 Maintenance of records.

Subpart D—Records of Requests and Dispositions

17.400 Scope of subpart.
17.401 Preliminary records.
17.402 Final records.
17.403 Sample format for preliminary and final records.

Subpart E—Act and Executive Order

17.500 Scope of subpart.
17.501 Act of August 28, 1958 (Public Law 85–804, 50 U.S.C. 1431–1435).
17.502 Executive Order No. 10789 of November 14, 1958 (23 F.R. 8897).

AUTHORITY: §§ 17.000 to 17.502 issued under R.S. 161, sec. 2202, 70A Stat. 120; 5 U.S.C. 22, 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314.

§ 17.000 Scope of Part.

As distinguished from the normal principles and procedures set forth in the other parts of this subchapter, this part establishes uniform regulations for entering into and amending or modifying contracts to facilitate the national defense under the extraordinary emergency authority granted by the Act of August 28, 1958 (Public Law 85–804); 72 Stat. 972; 50 U.S.C. 1431–1435, set forth in § 17.501, referred to in this part as "the Act," and Executive Order No. 10789, dated November 14, 1958 (23 F.R. 8897), set forth in § 17.502, referred to in this part as "the Executive Order." The Act empowers the President to authorize departments and agencies exercising functions in connection with the national defense, to enter into contracts or into amendments or modifications of contracts and to make advance payments, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense. This extraordinary authority may be exercised only in the unusual circumstances described in this part. This part does not cover advance payments (see Defense Contract Financing Regulations, AR 715–6; NAVEXOS P–1006; AFR 173–133, Part 163, Subchapter E, of this title).

§ 17.001 Approval of regulations and deviations.

The Executive Order authorizes the Secretaries of Defense, the Army, the Navy and the Air Force, respectively, under regulations prescribed or approved by the Secretary of Defense, to exercise this authority. This part has been concurred in by the Secretaries of the Army, the Navy, and the Air Force in accordance with §§ 1.101 and 1.105 of this chapter and has been approved by the Secretary of Defense. Notwithstanding § 1.105 of this chapter, any amendments to this part developed in accordance with the procedure specified in § 1.105 of this chapter and any deviations proposed to be made under the procedure specified in § 1.109 of this chapter shall be concurred in by the Secretaries of the Army, the Navy, and the Air Force, and approved by the Secretary of Defense.

Subpart A—General

§ 17.101 Previous authority.

Title II of the First War Powers Act, as amended and extended, expired June 30, 1958. Executive Order No. 10210, dated February 2, 1951; and the following joint regulations are thus no longer applicable:

(a) "Regulations Governing the Exercise of Certain Authority Granted by Title II of the First War Powers Act, as Amended, and Executive Order No. 10210, Issued Thereunder", dated February 21, 1951; and the amendment thereto dated January 12, 1954;

(b) "Coordinated Procedures to be Applied by the Army, Navy and Air Force for the Disposition of Requests by Contractors under Title II of the First War Powers Act, as Amended by Public Law 921, 81st Congress", dated June 23, 1951; and

(c) "Regulations Governing the Authority To Contract Under Title II of the First War Powers Act, as Amended, and Executive Order No. 10210, Issued Thereunder", dated July 17, 1951.

§ 17.102 General policy.

(a) The authority conferred by the Act shall be delegated by the Secretaries of the Military Departments in a manner which will best serve the logistic functions of the Departments and, at the same time, retain control over the exercise of the authority at a level high enough to insure uniformity of action.

(b) The authority conferred by the Act shall not be utilized so as to encourage carelessness and laxity on the part of persons engaged in the defense effort nor be relied upon by a Military Department where other adequate legal authority exists in the Department.

(c) The actions authorized under the Act shall be processed as expeditiously as practicable consistent with the care, restraint, and exercise of sound judgment, appropriate to such extraordinary authority. The interests of other departments and agencies of the Government shall be considered.

§ 17.103 Types of actions.

Three types of actions may be taken by or pursuant to the direction of an approving authority under the Act. These are—(a) contractual adjustments such as amendments without consideration, correction of mistakes, and formalization of informal commitments (see Subpart B of this part); (b) making advance payments (not covered by this part); and (c) exercise of "residual powers," which refers to all other authority, under the Act (see Subpart C of this part).

§ 17.104 Definitions.

(a) The term "approving authority" as used in this part means a Contract Adjustment Board, or an officer or official having authority to approve actions under the Act. This authority is distinguished from authority to take appropriate contractual action pursuant to such approval.

(b) The term "Secretarial level" as used in this part means an official at or above the level of an Assistant Secretary or his Deputy, and a Contract Adjustment Board established by the Secretary concerned.

Subpart B—Requests for Contractual Adjustment

§ 17.200 Scope.

This subpart provides for the establishment of a Contract Adjustment Board within each Military Department and describes certain delegations of authority. It also sets forth standards and the procedures for disposition of requests for contractual adjustment under the Act.

§ 17.201 Authority of the Secretaries.

The Secretary of each Department may delegate in writing his authority under the Act and the Executive Order, subject to the following limitations:

(a) Authority to approve actions under the Act obligating the United States in an amount in excess of $50,000 shall not be delegated below the Secretarial level; and

(b) Authority to approve any amendment without consideration which increases the stated contract price or unit price may not be delegated below the

Secretarial level except in extraordinary cases or classes of cases as to which the Secretary involved finds that there are special circumstances clearly justifying delegation to a lower level.

The delegations described in §§ 17.202 and 17.203 shall not be construed as limiting the authority of the Secretaries to modify or make other delegations. Copies of all delegations and successive redelegations shall be transmitted to the Assistant Secretary of Defense for Supply and Logistics at the time of issuance.

§ 17.202 Contract Adjustment Boards.

§ 17.202–1 Organization.

A Contract Adjustment Board has been established within each Military Department by the Secretary thereof. Such Boards consist of a Chairman and not less than two or more than six other members, one of whom may be designated the Vice-Chairman. A majority constitutes a quorum for any purpose and the concurring vote of a majority of the total Board membership constitutes an action of the Board. Alternates may be appointed to act in the absence of members.

§ 17.202–2 Authority.

The Contract Adjustment Board in each Department has been given authority to approve, authorize and direct appropriate action under the standards set forth in § 17.204 in any case submitted to it by an officer or official listed in § 17.203 or otherwise designated by the Secretary concerned, and to make all determinations and findings which are necessary or appropriate. Where deemed necessary to the exercise of the foregoing authority, such Boards may authorize any appropriate action not precluded by § 17.205, including the modification or release of any obligations. The decisions of such Boards shall be final, but each Board may reconsider and modify, correct, or reverse any of its previous decisions. Such Boards shall determine and adopt their own procedures and have authority to do all acts and things necessary or appropriate for the conduct of their functions.

§ 17.203 Authority of other officers and officials.

(a) The following authority has been delegated to the officers and officials listed in paragraph (b) of this section:

(1) Authority to deny any request for contractual adjustment under this subpart;

(2) Subject to the limitations set forth in § 17.205, authority to approve, authorize and direct appropriate action, and to make all determinations and findings which are necessary or appropriate, in the examples of mistake and informal commitment described in §§ 17.204–3 and 17.204–4, including, where necessary thereto, authority to modify or release unaccrued obligations of any sort and to extend delivery and performance dates; and

(3) Authority to submit to the cognizant Contract Adjustment Board for its determination, together with his recommendation—

(i) Any case where the officer or official recommends a specific adjustment which he does not have authority to approve under subparagraph (2) of this paragraph; and

(ii) Any doubtful or unusual case.

The foregoing authority may be redelegated only with the written approval of the Secretary concerned.

(b) The delegations of authority which have been made are as follows:

(1) The Army:

Deputy Chief of Staff for Logistics;
Chief, Contracts Branch, Procurement Division, Office of the Deputy Chief of Staff for Logistics;
Z.I. Army Commanders;
Commanding General, Military District of Washington, U.S. Army;
Commander in Chief, United States Army Europe;
Commanding General, United States Army Alaska;
Commanding General, United States Army Caribbean;
Commanding General, United States Army Japan;
Commanding General, Hawaii/25th Infantry Division;
Chiefs of Technical Services; and
Chief, National Guard Bureau.

(2) The Navy:

Chief of each Bureau;
Chief of Naval Research;
Aviation Supply Officer, Philadelphia;
Commander, Military Sea Transportation Service;
Commandant of the United States Marine Corps;
Executive Director, Military Medical Supply Agency, New York; and
Executive Director, Military Petroleum Supply Agency.

(3) The Air Force:

Chief of Staff; Vice Chief of Staff; and Deputy Chief of Staff, Materiel;
Commander, Air Materiel Command;
Commander, United States Air Force, Europe;
Commander, Pacific Air Force;
Commander, Alaska Air Command;
Commander, Caribbean Air Command;
Commander, Air Materiel Force, European Area; and
Commander, Air Materiel Force, Pacific Area.

§ 17.204 Standards for deciding cases.

§ 17.204–1 General.

The mere fact that losses occur under a Government contract is not, by itself, a sufficient basis for the exercise of the authority conferred by the Act. Whether, in a particular case, appropriate action such as amendment without consideration, correction of a mistake or ambiguity in a contract, or formalization of an informal commitment, will facilitate the national defense is a matter of sound judgment to be made on the basis of all of the facts of such case. Although it is obviously impossible to predict or enumerate all the types of cases with respect to which action may be appropriate, examples of certain cases or types of cases where action may be proper are set forth in §§ 17.204–2 to 17.204–4. Even if all of the factors contained in any of the examples are present, other factors or considerations in a particular case may result in a denial of the request. These examples are not intended to exclude other cases where a Contract Adjustment Board determines that the circumstances warrant action.

§ 17.204–2 Amendments without consideration.

(a) Where an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contracts or whose continued operation as a source of supply is found to be essential to the national defense, the contract may be adjusted but only to the extent necessary to avoid such impairment to the contractor's productive ability.

(b) Where a contractor suffers a loss (not merely a diminution of anticipated profits) on a defense contract as a result of Government action, the character of the Government action will generally determine whether any adjustment in the contract will be made and its extent. Where the Government action is directed primarily at the contractor and is taken by the Government in its capacity as the other contracting party, the contract may be adjusted if fairness so requires; thus, where such Government action, although not creating any liability on its part, increases the cost of performance, considerations of fairness may make appropriate some adjustment in the contract.

§ 17.204–3 Mistakes.

A contract may be amended or modified to correct or mitigate the effect of a mistake, including the following examples:

(a) A mistake or ambiguity which consists of the failure to express or to express clearly in a written contract the agreement as both understood it;

(b) A mistake on the part of the contractor which is so obvious that it was or should have been apparent to the contracting officer; and

(c) A mutual mistake as to a material fact.

Amending contracts to correct mistakes with the least possible delay normally will facilitate the national defense by expediting the procurement program and by giving contractors proper assurance that such mistakes will be corrected expeditiously and fairly.

§ 17.204–4 Informal commitments.

Informal commitments may be formalized under certain circumstances to permit payment to persons who have taken action without a formal contract; for example, where any person, pursuant to written or oral instructions from an officer or official of a Military Department and relying in good faith upon the apparent authority of the officer or official to issue such instructions, has arranged to furnish or has furnished property or services to a Military Department or to a defense contractor or subcontractor without formal contractual coverage for such property or services. Formalization of commitments under such circumstances normally will facilitate the national defense by assuring such persons that they will be treated fairly and paid expeditiously.

§ 17.205 Limitations upon exercise of authority.

§ 17.205–1 General limitations.

(a) The Act is not authority for:

(1) The use of the cost-plus-a-percentage-of-cost system of contracting;

(2) The making of any contract in violation of existing law relating to limitation of profit or fees;

(3) The negotiation or purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding; or

(4) The waiver of any bid, payment, performance or other bond required by law.

(b) No contracts, amendments, or modifications shall be entered into under the authority of the Act:

(1) Unless a finding is made that the action will facilitate the national defense;

(2) Unless other legal authority in the Department concerned is deemed to be lacking or inadequate; and

(3) Except within the limits of the amounts appropriated and the statutory contract authorization.

(c) No contract shall be amended or modified:

(1) Unless the request therefor has been filed before all obligations have been discharged and final payment made thereunder; and

(2) If the contract was negotiated under 10 U.S.C. 2304(a)(15), to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder.

(d) No informal commitment shall be formalized (1) unless a request for payment has been filed within six months after arranging to furnish or furnishing property or services in reliance upon the commitment and (2) unless it is found that at the time the commitment was made it was impracticable to use normal procurement procedures.

§ 17.205–2 Additional limitations upon authority below Secretarial level.

The exercise of authority by officers and officials below the Secretarial level pursuant to § 17.203(a)(2) shall be subject to the following additional limitations:

(a) The action shall not deal with or directly affect any matter which has been submitted to the General Accounting Office;

(b) The action shall not obligate the Government in an amount in excess of $50,000;

(c) The action shall not release a contractor from performance of an obligation—

(1) Priced in excess of $50,000; or

(2) Where reprocurement is contemplated, unless the approving authority finds that the estimated actual or potential increase in cost to the Government will not exceed $50,000;

(d) The action shall not involve the disposal of Government surplus property;

(e) Mistakes shall not be corrected by action obligating the Government in an amount in excess of $500 unless notice of the mistake was given to the contracting officer before completion of the contractor's work or the effective date of contract termination; and

(f) The correction of a contract because of a mistake in its making shall not result in increasing the original contract price above the next lowest responsive bid of a responsible bidder in the case of a formally advertised procurement, or the amount of the next lowest responsible proposal of a responsible offeror considered in the case of a negotiated procurement.

§ 17.206 Contractual requirements.

Every contract entered into or amended or modified pursuant to this part shall contain:

(a) A citation of the Act and Executive Order;

(b) A brief statement of the circumstances justifying the action;

(c) A recital of the finding that the action will facilitate the national defense;

(d) The contract clause, entitled "Covenant Against Contingent Fees," as set forth in § 7.103–20 of this chapter;

(e) The contract clause, entitled "Examination of Records," as set forth in § 7.104–15 of this chapter except as provided in § 6.701 of this chapter as to purchases made under the Mutual Security Act;

(f) The contract clause entitled "Nondiscrimination in Employment," as set forth in § 12.802 of this chapter, wherever required under Subpart H, Part 12 of this chapter;

(g) The contract clause, entitled "Assignment of Claims" as set forth in § 7.103–8 of this chapter;

(h) If otherwise applicable, the contract clauses entitled "Walsh-Healey Public Contracts Act," "Davis-Bacon Act," "Copeland ('Anti-Kickback') Act—Nonrebate of Wages," and "Eight-Hour Laws—Overtime Compensation," as set forth respectively in §§ 12.604, and 12.403 of this chapter; and

(i) Any other clauses set forth in this subchapter which are appropriate to the particular procurement.

§ 17.207 Submission of requests by contractors.

§ 17.207–1 Filing requests.

Any person seeking an adjustment under the standards set forth in § 17.204 called the "contractor" in this part) may file a request in duplicate with the cognizant contracting officer or his duly authorized representative. If such filing is impracticable, requests will be deemed to be properly filed if filed with the following addressees for forwarding to the cognizant contracting officer:

(a) In the Army,

Deputy Chief of Staff for Logistics
Attn: Chief, Contracts Branch
Department of the Army
Washington 25, D.C.;

(b) In the Navy,

The Navy officer or official listed in § 17.203(b)(2) appearing to be cognizant of the contract or commitment involved; and

(c) In the Air Force,

Commander, Air Materiel Command
Attn: Readjustment Division, MCPR
Wright-Patterson Air Force Base, Ohio

§ 17.207–2 Form of requests by contractors.

The contractor's request shall normally consist of a letter to the contracting officer stating:

(a) The precise adjustment requested;

(b) The essential facts summarized in chronological narrative form;

(c) The contractor's conclusions based on such facts and showing, in terms of the standards set forth in § 17.204, why the contractor considers itself entitled to the adjustment requested;

(d) Whether all obligations have been discharged under the contracts involved;

(e) Whether final payment has been made under the contracts involved;

(f) Whether any proceeds from the request will be subject to any assignment or other transfer, and to whom; and

(g) Whether the contractor has sought the same, or a similar or related, adjustment from the General Accounting Office or any other part of the Government, or anticipates doing so.

§ 17.207–3 Records.

At the time the request is filed, a preliminary record as described in this subpart shall be prepared by the activity responsible for the case under § 17.203. A copy of each such record prepared during each month shall be forwarded within 30 days after the close of the month as follows:

(a) Army activities, to DCSLOG, Attn: Procurement Division;

(b) Navy activities, to the Office of Naval Material. (Navy Contract Adjustment Board); and

(c) Air Force activities, to the Air Force Contract Adjustment Board, Office of the Assistant Secretary of the Air Force (Materiel).

§ 17.207–4 Facts and evidence.

(a) The contracting officer, or any officer, official, or Contract Adjustment Board, having authority to act upon the contractor's request, may, where considered pertinent, request the contractor to furnish additional facts, and evidence, as described in this paragraph, and, in addition, where applicable, as described in paragraph (b), (c), (d), or (e) of this section (in complying with such requests, the contractor may also submit other statements and evidence which he may consider helpful to the case):

(1) If written contracts are involved, a brief description of the contracts, indicating the dates of execution and amendments thereto, the items being procured, the price or prices and delivery schedule and revisions thereof, and such other special contractual provisions as may be relevant to the request;

(2) A history of performance indicating when work under the contracts or commitments was begun, the progress made to the present, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion thereof;

(3) A statement of payments received, payments due, and payments yet to be received or to become due, including ad-

vance and progress payments, and amounts withheld by the Government, and information as to other obligations of the Government; if any, which are yet to be performed under the contract;

(4) A statement giving a detailed analysis of the monetary elements of the request including precisely how the actual or estimated dollar amount of the request was arrived at, the effect of approval or denial on the contractor's profits before Federal income taxes, and whether the costs for which reimbursement is requested have been included as a part of its gross costs in statutory renegotiation proceedings, together with the contractor's renegotiation status for the relevant years;

(5) If a written contract is involved, a statement of the contractor's understanding of why the subject matter of the request cannot now be and could not at the time it arose be disposed of under the terms of the contract itself;

(6) The best evidence available to the contractor in support of any facts alleged by the contractor, including contemporaneous memoranda, correspondence, affidavits, and any other material tending to establish matters of fact;

(7) Relevant financial statements, cost analyses, or other such data, preferably certified by a certified public accountant, including such additional financial data as is necessary to explain fully and to support the monetary elements of the request for adjustment;

(8) A list of persons (within the Department of Defense, in the employ of the contractor, or otherwise connected with the contract) who have some factual knowledge of the subject matter, including where possible the name, office or title, address and telephone number of each such person;

(9) A statement and evidence of steps taken to mitigate loss and reduce claims to a minimum; and

(10) Such other statements or evidence as may be requested by the contracting officer.

(b) Amendments without consideration under § 17.204–2(a): In addition to the facts and evidence listed in paragraph (a) of this section, where a request involves possible amendment without consideration, and essentiality to the national defense is a factor, the contractor may be asked to furnish:

(1) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances and profit;

(2) A statement and evidence of the contractor's present estimate of total costs under the contracts involved if enabled to complete, broken down between costs accrued to date of request, and run-out costs, and as between costs for which the contractor has made payment and those for which it is indebted at the time of the request;

(3) A statement and evidence of the contractor's estimate of the final price of the contracts involved giving effect to all escalation, changes, extras and the like, known or contemplated by the contractor;

(4) A statement of any claims known or contemplated by the contractor against the Government involving the contracts in question, other than those stated in response to subparagraph (3) of this paragraph;

(5) An estimate of the total profit or loss under the contracts involved if enabled to complete at the final contract price (see (3) above) broken down between profit or loss to date, and runout profit or loss;

(6) An estimate of the total profits from other Government business, and all other sources, during the period from the date of the first contract involved to the estimated date of completion of all the contracts involved;

(7) A statement of the amount of any tax refunds and an estimate of those anticipated during or for the period from the date of the first contract involved through the estimated completion date of all the contracts involved;

(8) A statement in detail as to efforts the contractor has made to obtain funds from commercial sources to enable it to complete performance of the contracts involved;

(9) A statement of the minimum amount necessary as an amendment without consideration to enable the contractor to complete performance of the contracts involved, and the detailed basis for that amount;

(10) An estimate of the time required to complete each contract, if the request is granted;

(11) A statement of the factors which have caused the loss under the contracts involved;

(12) A statement as to the course of events anticipated if the request is denied;

(13) Balance sheets, preferably certified by a certified public accountant, as of the end of the contractor's fiscal year first preceding the date of the first contract, as of the end of each subsequent fiscal year, as of the date of request, and projected as of the date of completion of all the contracts assuming the contractor is enabled to complete the contracts at the final prices estimated pursuant to subparagraph (3) of this paragraph, together with income statements for annual periods subsequent to the date of the first balance sheet. Balance sheets and income statements should be both consolidated, and by affiliates, and should show all transactions between the contractor and its affiliates, stockholders, and partners, including loans to the contractor guaranteed by any stockholder or partner; and

(14) A list of all salaries, bonuses and all other forms of compensation of the principal officers or partners and of all dividends and other withdrawals, and all payments to stockholders in any form since the date of the first contract involved.

(c) Amendments without consideration under § 17.204–2(b). In addition to the facts and evidence listed in paragraph (a) of this section, where a request involves possible amendment without consideration because of Government action, and essentiality to the national defense is not a factor, the contractor may be asked to furnish:

(1) A clear statement of the precise Government action which the contractor considers caused a loss under the contract with evidence to support each essential fact;

(2) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit;

(3) The estimated total loss suffered under the contract, with detailed supporting analysis; and

(4) The estimated loss resulting from the Government action, with detailed supporting analysis.

(d) Correction of mistakes: In addition to the facts and evidence listed in paragraph (a) of this section, where a request involves possible correction of a mistake, the contractor may be asked to furnish:

(1) A statement and evidence of the precise mistake or error that was made, the ambiguity that exists, or the misunderstanding that arose, showing of what it consisted and how it occurred, and the intention of the parties;

(2) A statement explaining when the mistake was discovered, when notice of mistake was given to the contracting officer, and whether given before completion of work under, or the effective date of termination of, the contract;

(3) An estimate of loss or profit under the contract with detailed supporting analysis; and

(4) An estimate of the increase in cost to the Government resulting from the adjustment requested with detailed supporting analysis.

(e) Formalization of informal commitments: In addition to the facts and evidence listed in paragraph (a) above, where a request involves possible formalization of an informal commitment, the contractor may be asked to furnish:

(1) Copies of any written instructions or assurances, or a statement under oath of any oral instructions or assurances made to the contractor, with identification of the Government officer or official making such statement;

(2) A statement as to when the property or services were furnished or arranged to be furnished, and to whom;

(3) Evidence that the contractor relied upon the instructions or assurances, with a full description of the circumstances which led it so to rely, and that the contractor intended, at the time of performing the work, to be compensated directly for it by the Government and did not anticipate recovery of the costs in some other way;

(4) A cost breakdown supporting the amount claimed as a fair compensation for the work performed; and

(5) A statement and evidence of why it was impracticable to provide for the work performed in an appropriate contractual instrument.

§ 17.208 Processing cases.

§ 17.208–1 Investigation.

Officers and officials listed in § 17.203 (b) shall be responsible in all cases for making a thorough investigation of all facts and issues relevant to a request. Facts and evidence shall be obtained

from contractor and Government personnel, and shall include signed statements of material facts within the knowledge of individuals where documentary evidence is lacking, and audits where considered necessary to establish financial or cost facts. The investigation shall establish (a) the facts essential to meeting the standards for deciding the particular case and (b) the essential facts as to who has authority to approve the request.

§ 17.208–2 Disposition below Secretarial level.

(a) *Disposition.* In each case where the request for relief is denied or approved finally below Secretarial level (see § 17.203), the approving authority shall sign a Memorandum of Decision, whether approving or denying the request, which memorandum shall be dated and shall contain the following:

(1) The name and address of the contractor, the contract identification, and the nature of the request;

(2) The decision reached and the actual cost or estimated potential cost, if any, of the decision;

(3) A concise description of the property or services involved;

(4) A statement of the circumstances justifying the decision;

(5) If some adjustment action is approved, a statement in substantially the following form, "I find that the action authorized herein will facilitate the national defense"; and

(6) Identification of any of the foregoing information which is classified "Confidential," including "Confidential—Modified Handling Authorized," or higher.

(b) *Records.* Each of the following documents shall be submitted to the addressees set forth in § 17.207–3 within 30 days after the close of the month during which it is executed:

(1) Two copies of the Memorandum of Decision;

(2) One copy of the contractual document implementing any decision, approving contractual action; and

(3) One copy of a final record, as prescribed in Subpart D of this part, prepared by the activity responsible for the case under § 17.203. The item in subparagraph (2) of this paragraph will not be submitted in the case of the Army.

§ 17.208–3 Submission of cases to the Contract Adjustment Board.

(a) *Statement to Board.* Cases to be submitted for consideration of the cognizant Contract Adjustment Board shall be forwarded by means of a letter signed by the officer or official responsible for the case under § 17.203. The letter shall state:

(1) The nature of the case;

(2) The basis for the Board's authority to act under §§ 17.202 and 17.203;

(3) The findings of fact essential to the case (see § 17.207–4) arranged chronologically with cross-references to supporting enclosures;

(4) The conclusions drawn from applying the standards for deciding cases, as set forth in § 17.204, to the findings of fact; and

(5) The disposition recommended, and, if contract action is recommended, the opinion of the signer that such action will facilitate the national defense; and

(6) Where the case involves a Mutual Security Act purchase within the scope of § 6.701–1(b) of this chapter, a recommendation as to the impracticability of inclusion of the Examination of Records clause set forth in § 7.104–15 of this chapter (see §§ 17.206(c) and 6.701).

The letter shall inclose copies of the contractor's request, the evidentiary materials, and all indorsements, reports and comments of cognizant Government officials. The letter and enclosure shall be in duplicate.

(b) *Amendments without consideration under § 17.204–2(a).* A letter to the Board recommending an amendment without consideration under the standards of § 17.204–2(a), should, in addition to the requirements of paragraph (a) of this section, ordinarily cover, with supporting data as appropriate, the findings and conclusions with respect to all of the items set forth in § 17.207–4(b) and, in addition, findings as to:

(1) The contractor's performance record, including the quality of product, rate of production and promptness of deliveries;

(2) The importance to the Government, particularly to the operating forces, of the performance of the contract by contractor and the importance of the contractor to the national defense;

(3) Forecast of future contracts with the contractor; and

(4) Other available sources of supply for the supplies or services covered by the contract, and the time and cost of having contract performance completed by such other sources.

(c) *Forwarding to Boards.* Cases to be submitted to the Boards shall be forwarded through the following channels:

(1) In the Army and the Navy, normally, each case shall be sent from the Head of a Procuring Activity directly to the Board;

(2) In the Air Force, normally, each case shall be sent from Air Materiel Command, through the Deputy Chief of Staff, Materiel, Headquarters USAF, and after review there, to the Board; or if the case comes from an overseas command, it shall be sent through the Commander, Air Materiel Command, ATTN: Readjustment Division, MCPR, and after review there, to the Board through the Deputy Chief of Staff Materiel, Headquarters, USAF.

§ 17.208–4 Processing by Contract Adjustment Boards.

(a) *Disposition.* Upon receipt of cases, the Contract Adjustment Boards, each in accord with its own procedures, shall render decisions as expeditiously as practicable. The chairman shall sign a Memorandum of Decision disposing of the case, which shall be dated and shall contain the information required by § 17.208–2(a) 1 to (5). The Memorandum of Decision shall omit any information classified "Confidential," including "Confidential—Modified Handling Authorized," or higher. The Board's decision will be communicated to the appropriate officer or official for implementing action.

(b) *Records.* When the Board decisions are implemented, the documents listed in § 17.208–2(b) (2) and (3) shall be prepared and submitted to the cognizant Board, except that, in the case of the Army, the record required by § 17.208–2(b)(3) shall be forwarded to the Programs and Budget Branch, Procurement Division, DCSLOG. The activity which forwarded the case to the Board shall be responsible for the preparation and submission of these documents.

§ 17.208–5 Maintenance of records.

The records required by §§ 17.207–3, 17.208–2(b) and 17.208–4(a) and (b) shall be maintained in the Army by DCSLOG and in the Navy and Air Force, by the respective Boards.

§ 17.208–6 Interdepartmental coordination.

(a) *General.* Where a case involves matters of interest to more than one department or agency, any interested Military Department shall maintain liaison with other Military Departments and other departments and agencies of the Government and may take such joint action as may be proper under the circumstances, including holding joint meetings or hearings.

(b) *Cases involving funds of other Military Departments.* Requests for adjustment within any category, where the funds of other than the procuring Department may be required, shall not be approved by the procuring Department until advice is requested and received from the requiring Department that additional funds will be made available. The request for such advice shall disclose the following data:

(1) Contractor's name;

(2) MIPR number;

(3) Contract number;

(4) Amount of proposed relief;

(5) Brief description of the procurement; and

(6) Accounting classification—fund citation.

If such additional funds are made available, the action to be taken on a particular request, however, shall be solely the responsibility of the Department considering such request.

(c) *Amendments without consideration involving other Military Departments.* Requests for amendments without consideration, where essentiality to the national defense is an issue and involves another Military Department, shall not be finally determined by one Department until advice on such issue is requested and received from the other Department. When such advice is received, the responsibility for taking the appropriate action, if any, shall be with the Department considering the request.

Subpart C—Residual Powers

§ 17.300 Scope.

This subpart describes the delegations of authority, and the standards and procedures for the exercise of residual powers under the Act. The term "residual powers" as used in this subpart includes all the authority under the Act except that which is covered by Subpart B of this part and the authority to make advance payments.

§ 17.301 Delegations of authority.

Authority to take actions under the residual powers of the Act is vested in the Secretary of each Department and may be defined and delegated in writing by him within his Department: *Provided, however,* That authority to approve actions obligating the United States in an amount in excess of $50,000 shall not be delegated below the Secretarial level, and authority to approve actions obligating $50,000 or less shall not be delegated below the Head of a Procuring Activity in the Army and the Navy, and in the Air Force, the Director of Procurement and Production, Headquarters, AMC. Copies of all delegations and successive redelegations shall be transmitted to the Assistant Secretary of Defense for Supply and Logistics at the time of issuance.

§ 17.302 Standards for using residual powers.

Subject to the limitations contained in § 17.205–1, the residual powers may be used in accordance with the policies set forth in § 17.102 where such use is deemed necessary and appropriate under all the circumstances.

§ 17.303 Procedures.

(a) All proposals for the exercise of residual powers shall be forwarded except as Departmental regulations may otherwise provide through normal channels within the Military Departments to the Assistant Secretary or other approving authority.

(b) The approving authority shall sign a Memorandum of Approval containing the information set forth in § 17.208–2(a).

(c) Every contract entered into or amended or modified under the residual powers shall comply with the provisions of § 17.206.

§ 17.304 Maintenance of records.

DCSLOG in the Army, and the respective Contract Adjustment Boards in the Navy and the Air Force, shall be responsible for maintaining two copies of each Memorandum of Approval required by § 17.303(b).

Subpart D—Records of Requests and Dispositions

§ 17.400 Scope of subpart.

In order that adequate records of actions by each Department pursuant to the Act may be maintained, § 17.207–3 requires the preparation of a preliminary record when each request is filed for an adjustment under the standards set forth in § 17.204, and §§ 17.208–2(b)(3) and 17.208–4(b) require the preparation of a final record indicating the disposition of the request. This subpart describes in detail the information which should be included in these records.

§ 17.401 Preliminary records.

Each preliminary record prepared pursuant to § 17.207–3 should contain the following information:

(a) *Type of record.* The fact that the record is a preliminary record should be indicated;

(b) *Date of contractor's request.* The date on the face of the contractor's request for adjustment should be inserted;

(c) *Date received by Government.* The date the request for adjustment is received in any Government office to which the contractor may properly submit his request should be inserted;

(d) *Name and address of contractor.* The full and correct name and address of the contractor filing the request should be inserted. If the contractor is a small business, this fact should be indicated;

(e) *Name and address of the contractor's representative, if any.* If a particular named person (employee, attorney, etc.) is the point of contact with the contractor, his full name and address should be inserted;

(f) *Cognizant contracting officer or office.* The contracting officer administering the contract for which an adjustment was requested or, if none, the contracting officer or office cognizant of the request should be inserted;

(g) *Procuring activity.* The name of the procuring activity with jurisdiction over the contracting officer or office referred to in paragraph (f) of this section, should be inserted;

(h) *Property or service involved.* A brief description of the item being procured or services being rendered should be inserted;

(i) *Extent of performance as of date of request.* A brief indication, as of the date of request, of the degree of completion of the contract should be inserted; whether the work is completed but final payment is yet to be made or, for example, 50 percent completed, or performance not yet begun, should be indicated;

(j) *Contract number and date.* The identifying numbers and dates of the contracts for which an adjustment is requested should be inserted. If there is no contract, then the word "None" should be inserted. If the question arises under a letter of intent, then that fact and the date of such letter should be inserted;

(k) *Advertised or negotiated.* Whether the contract was entered into pursuant to advertising or negotiation should be indicated. If negotiated, the specific authority should be indicated. Example: "Neg.—10 USC 2304(a)(14)";

(l) *Firm FP, FP Redet, or Cost.* The basic pricing characteristic of the contract or the procurement should be inserted as follows: "Firm FP" or "FP Redet" or "Cost";

(m) *Category of case.* Whether the request involves an amendment without consideration, a mistake, or an informal commitment should be inserted. If the elements of the case are mixed, then two or more categories should be indicated; however, the primary theory of the request should be indicated by the first category inserted;

(n) *Amount or description of request.* If the request is expressed in dollars, as a change in price, then that fact should be inserted as follows: "$5,250 increase" or "$5,250 decrease." If the request seeks an adjustment which cannot be expressed in monetary terms, then some brief description of it should be inserted, such as "Cancellation" or "Modification of Terms." The fact that an adjustment is not easily expressed in dollar terms should not deter an estimate if such an estimate is made by the contractor in his request;

(o) *Date of this record.* The date on which the record is signed and forwarded should be inserted; and

(p) *Signature.* The record should be signed by an authorized representative of the reporting authority.

§ 17.402 Final records.

Each final record prepared pursuant to §§ 17.208–2(b)(3) or 17.208–4(b) should contain the information listed in § 17.401 (b) to (p) and, in addition, should contain the following information:

(a) *Type of record.* The fact that the record is a final record should be indicated;

(b) *Action below Secretarial level.* The disposition of the case, the office which took action, and the date thereof should be inserted. The disposition should be indicated as: "withdrawn," "denied," "approved," or "forwarded." If the request was approved in whole or in part, the dollar amount or nature of the action should be indicated in a manner similar to that described in § 17.401 (n). The date should correspond with the date of the Memorandum of Decision or of the letter forwarding the request to the Board.

(c) *Action by Contract Adjustment Board and date.* The disposition of the case by the Contract Adjustment Board and the date thereof should be indicated in a manner similar to that described in paragraph (b) of this section; and

(d) *Implementation and date.* The contractual action or correspondence which implements the decision of the approving authority or of the Board should be inserted as follows: "amendment," "new contract," or "letter of denial."

§ 17.403 Sample format for preliminary and final records.

The preliminary and final records described in §§ 17.401 and 17.402 may be prepared in a format substantially as follows:

☐ Preliminary	RECORD OF REQUEST FOR ADJUSTMENT PUBLIC LAW 85-804		Final ☐
Date of Request			Date Received by Government
Contractor's Name and Address			☐ Small Business
Name and Address of Contractor's Representative, if Any			
Cognizant Contracting Officer or Office		Procuring Agency	
Property or Service Involved		Extent of Performance as of Date Request Received	
Contract Number	Date	Advertised or Negotiated	Firm FP, FP Redet, or Cost
Category of Case		Amount or Description of Request	
Action Below Secretarial Level			Date
Action by CAB			Date
Implementation			Date
Additional Data or Remarks			
Date of This Record		Signature	

Subpart E—Act and Executive Order

§ 17.500 Scope of subpart.

This subpart sets forth in full the Act and Executive Order.

§ 17.501 Act of August 28, 1958 (Public Law 85-804, 50 U.S.C. 1431-1435).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense. The authority conferred by this section shall not be utilized to obligate the United States in an amount in excess of $50,000 without approval by an official at or above the level of an Assistant Secretary or his Deputy, or an assistant head or his deputy, of such department or agency, or by a Contract Adjustment Board established therein.

SEC. 2. Nothing in this Act shall be construed to constitute authorization hereunder for—

(a) The use of the cost-plus-a-percentage-of-cost system of contracting;

(b) Any contract in violation of existing law relating to limitation of profits;

(c) The negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding;

(d) The waiver of any bid, payment, performance, or other bond required by law;

(e) The amendment of a contract negotiated under section 2304(a)(15), title 10, United States Code, or under section 302(c)(13) of the Federal Property and Administrative Services Act of 1949, as amended (63 Stat. 377, 394), to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder; or

(f) The formalization of an informal commitment, unless it is found that at the time the commitment was made it was impracticable to use normal procurement procedures.

SEC. 3. (a) All actions under the authority of this Act shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be detrimental to the national security.

(b) All contracts entered into, amended, or modified pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment, have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts.

SEC. 4. (a) Every department and agency acting under authority of this Act shall, by March 15 of each year, report to Congress all such actions taken by that department or agency during the preceding calendar year. With respect to actions which involve actual or potential cost to the United States in excess of $50,000, the report shall—

(1) Name the contractor;

(2) State the actual cost or estimated potential cost involved;

(3) Describe the property or services involved; and

(4) State further the circumstances justifying the action taken.

With respect to (1), (2), (3), and (4), above, and under regulations prescribed by the President, there may be omitted any information the disclosure of which would be detrimental to the national security.

(b) The Clerk of the House and the Secretary of the Senate shall cause to be published in the Congressional Record all reports submitted pursuant to this section.

SEC. 5. This Act shall be effective only during a national emergency declared by Congress or the President and for six months after the termination thereof or until such earlier time as Congress, by concurrent resolution, may designate."

§ 17.502 Executive Order No. 10789 of November 14, 1958 (23 F.R. 8897).

AUTHORIZING AGENCIES OF THE GOVERNMENT TO EXERCISE CERTAIN CONTRACTING AUTHORITY IN CONNECTION WITH NATIONAL-DEFENSE FUNCTIONS AND PRESCRIBING REGULATIONS GOVERNING THE EXERCISE OF SUCH AUTHORITY

By virtue of the authority vested in me by the act of August 28, 1958, 72 Stat. 972, hereinafter called the act, and as President of the United States, and in view of the existing national emergency declared by Proclamation No. 2914 of December 16, 1950, and deeming that such action will facilitate the national defense, it is hereby ordered as follows:

PART I—DEPARTMENT OF DEFENSE

Under such regulations, which shall be uniform to the extent practicable, as may be prescribed or approved by the Secretary of Defense:

1. The Department of Defense is authorized, within the limits of the amounts appropriated and the contract authorization provided therefore, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts, whenever, in the judgment of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, or the duly authorized representative of any such Secretary, the national defense will be facilitated thereby.

2. The Secretaries of Defense, the Army, the Navy, and the Air Force, respectively, may exercise the authority herein conferred and, in their discretion and by their direction, may delegate such authority to any other military or civilian officers or officials of their respective departments, and may confer upon any such military or civilian officers or officials the power to make further delegations of such authority within their respective commands or organizations: *Provided,* That the authority herein conferred shall not be utilized to obligate the United States in an amount in excess of $50,000 without approval by an official at or above the level of an Assistant Secretary or his Deputy, or by a departmental Contract Adjustment Board.

3. The contracts hereby authorized to be made shall include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of property or services necessary, appropriate, or convenient for the national defense, or for the invention, development, or production of, or research concerning any such property or services, including, but not limited to, aircraft, missiles, buildings, ves-

sels, arms, armament, equipment or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment without any restriction of any kind as to type, character, location, or form.

4. The Department of Defense may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance payments upon such contracts of any portion of the contract price, and may enter into agreements with contractors or obligors modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds. Amendments or modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making, or the form, of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof.

5. Proper records of all actions taken under the authority of the act shall be maintained within the Department of Defense. The Secretaries of Defense, the Army, the Navy, and the Air Force shall make such records available for public inspection except to the extent that they, or their duly authorized representatives, may respectively deem the disclosure of information therein to be detrimental to the national security.

6. The Department of Defense shall, by March 15 of each year, report to the Congress all actions taken within that department under the authority of the act during the preceding calendar year. With respect to actions which involve actual or potential cost to the United States in excess of $50,000, the report shall (except as the disclosure of such information may be deemed to be detrimental to the national security)—

(a) name the contractor;

(b) state the actual cost or estimated potential cost involved;

(c) describe the property or services involved; and

(d) state further the circumstances justifying the action taken.

7. There shall be no discrimination in any act performed hereunder against any person on the ground of race, religion, color, or national origin, and all contracts entered into, amended, or modified hereunder shall contain such nondiscrimination provision as otherwise may be required by statute or Executive order.

8. No claim against the United States arising under any purchase or contract made under the authority of the act and this order shall be assigned except in accordance with the Assignment of Claims Act of 1940 (54 Stat. 1029), as amended.

9. Advance payments shall be made hereunder only upon obtaining adequate security.

10. Every contract entered into, amended, or modified pursuant to this order shall contain a warranty by the contractor in substantially the following terms:

"The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except bona-fide employees or bona-fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee."

11. All contracts entered into, amended, or modified pursuant to authority of this order shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment, have access to and the right to examine any directly pertinent books, documents, papers, and records of the Contractor or any of his subcontractors engaged in the performance of, and involving transactions related to, such contracts or subcontracts.

12. Nothing herein contained shall be construed to constitute authorization hereunder for—

(a) The use of the cost-plus-a-percentage-of-cost system of contracting;

(b) Any contract in violation of existing law relating to limitation of profits or fees;

(c) The negotiation of purchases of or contracts for property or services required by law to be procured by formal advertising and competitive bidding;

(d) The waiver of any bid, payment, performance, or other bond required by law;

(e) The amendment of a contract negotiated under section 2304(a)(15) of title 10 of the United States Code to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder; or

(f) The formalization of an informal commitment, unless the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, or the duly authorized representative of any such Secretary, finds that at the time the commitment was made it was impracticable to use normal procurement procedures.

13. The provisions of the Walsh-Healy Act (49 Stat. 2036), as amended, the Davis-Bacon Act (49 Stat. 1011), as amended, the Copeland Act (48 Stat. 948), as amended, and the Eight Hour Law (37 Stat. 137), as amended, if otherwise applicable, shall apply to contracts made and performed under the authority of this order.

14. Nothing herein contained shall prejudice anything heretofore done under Executive Order No. 9001 of December 27, 1941, or Executive Order No. 10210 of February 2, 1951, or any amendments or extensions thereof, or the continuance in force of an action heretofore taken under those orders or any amendments or extensions thereof.

15. Nothing herein contained shall prejudice any other authority which the Department of Defense may have to enter into, amend, or modify contracts, and to make advance payments.

PART II—EXTENSION OF PROVISIONS OF PARAGRAPHS 1–14

21. Subject to the limitations and regulations contained in paragraphs 1 to 14, inclusive, hereof, and under any regulations prescribed by him in pursuance of the provisions of paragraph 22 hereof, the head of each of the following-named agencies is authorized to perform or exercise as to his agency, independently of any Secretary referred to in the said paragraphs 1 to 14, all the functions and authority vested by those paragraphs in the Secretaries mentioned therein:

Department of the Treasury.
Department of the Interior.
Department of Agriculture.
Department of Commerce.
Atomic Energy Commission.
General Services Administration.
Office of Civil and Defense Mobilization.
National Aeronautics and Space Administration.
Federal Aviation Agency.
Tennessee Valley Authority.
Government Printing Office.

22. The head of each agency named in paragraph 21 hereof is authorized to prescribe regulations governing the carrying out of the functions and authority vested with respect to his agency by the provisions of paragraph 21 hereof. Such regulations shall, to the extent practicable, be uniform with the regulations prescribed or approved by the Secretary of Defense under the provisions of Part I of this order.

23. Nothing contained herein shall prejudice any other authority which any agency named in paragraph 21 hereof may have to enter into, amend, or modify contracts and to make advance payments.

24. Nothing contained in this Part shall constitute authorization thereunder for the amendment of a contract negotiated under section 302(c)(14) of the Federal Property and Administrative Services Act of 1949 (63 Stat. 394), as amended by section 2(b) of the act of August 28, 1958, 72 Stat. 966, to increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder.

PART 30—APPENDIXES TO ARMED SERVICES PROCUREMENT REGULATIONS

Sec.

30.1 Appendix A—Armed Services Board of Contract Appeals.
30.2 Appendix B—Manual for control of Government property in possession of contractors.
30.3 Appendix C—Manual for control of Government property in possession of non-profit research and development contractors.
30.4 Appendix D—Rules for notice and hearing under gratuities clause in Armed Services Procurement Regulation 7.104–16.
30.5 Appendix E—Defense Contract Financing Regulations.

AUTHORITY: §§ 30.1 to 30.5 issued under R.S. 161, sec. 2202, 70A Stat. 120; 5 U.S.C. 22, 10 U.S.C. 2202. Interpret or apply secs. 2301–2314, 70A Stat. 127–133; 10 U.S.C. 2301–2314.

§ 30.1 Appendix A — Armed Services Board of Contract Appeals.

PART I—CHARTER

1. There is hereby created, as a joint board of the Departments of the Army, Navy, and Air Force, the Armed Services Board of Contract Appeals, which shall be responsible directly to the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, jointly, for the proper performance of the delegated authority hereinafter conferred. The Board shall operate under general policies established or approved by the Assistant Secretary of Defense (Supply and Logistics).

2. The Board shall consist of persons trained in the law. There shall be a president of the Board. The chairmen of the Army, Navy, and Air Force panels of the Board (as hereinafter described) shall each in that order serve as the president of the Board on a yearly rotational basis. In the absence of the president the panel chairman next in order of succession shall act as president. If it shall be determined at any time that additional members of the Board are necessary in order to process appeals with reasonable dispatch, the president of the Board, with the advice of the panel chairmen, shall recommend to the pertinent Assistant and Under Secretaries of the three Departments for appointment such additional members of the Board as are deemed necessary, and shall similarly make recommendations for the filling of any vacancy on the Board. Appointments will be made by joint action of the pertinent Assistant and Under Secretaries of the three Departments.

3. There shall be three panels of the Board. One of the panels shall be known as the Army contract appeals panel, and shall consist of such members of the Armed Services Board of Contract Appeals as shall be assigned to the panel by the Under Secretary or the Assistant Secretary of the Army, whichever is appropriate, who shall also designate the chairman of said panel; one of the panels shall be known as the Navy contract appeals panel, and shall consist of such members of the Armed Services Board of Contract Appeals as shall be assigned to the panel by the Under Secretary or the Assistant Secretary of the Navy, whichever is appropriate, who shall also designate the chairman of said panel; and one of the panels shall be known as the Air Force contract appeals panel, and shall consist of such members of the Armed Services Board of Contract Appeals as shall be assigned to the panel by the Under Secretary or the Assistant Secretary of the Air Force, whichever is appropriate, who shall also designate the chairman of said panel. The president of the Board may assign members (other than the chairman) from one panel to duty with another panel on a temporary basis as the workload of the particular panels may require. Each of the departmental panels shall function under the supervision of its panel chairman.

4. The Armed Services Board of Contract Appeals is hereby designated and shall act as the authorized representative of the respective Secretaries of the Army, Navy, and Air Force in hearing, considering and determining as fully and finally as might each of the Secretaries (a) appeals by contractors from decisions on disputed questions by contracting officers or their authorized representatives or by other authorities pursuant to the provisions of armed services contracts requiring the decision of appeals by the head of a Department of the armed services or his duly authorized representative or board, or pursuant to the provisions of any directive whereby the Secretary of a Department of the armed services has granted a right of appeal not contained in the contract; (b) appeals by armed services contractors pursuant to section 13(c)(1)(1) and section 17(c) of the Contract Settlement Act of 1944. When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may nevertheless in its discretion hear, consider, and decide all questions of law necessary for the complete adjudication of the issue. Unless the contract provides otherwise, when in the consideration of an appeal it appears that a claim for unliquidated damages is involved therein, the Board shall, insofar as the evidence permits, make findings of fact with respect to such claims without expressing opinion on questions of liability.

5. When a contract requires the Secretary of a Department of the armed services, personally, to render a decision on the matter in dispute, the Armed Services Board of Contract Appeals, in accordance with the procedure set forth in paragraph 6, shall make findings and recommendations to the Secretary of the Department with respect thereto.

6. The president of the Board shall be responsible for assigning appeals to the departmental panels for decision. In general, appeals shall be assigned to the panel of the Department whose contract or procurement is directly involved. Each of the three panels of the Board shall act in divisions which shall normally consist of three or more members of the panel, to be selected by the chairman of the panel. A majority of the members of a division shall constitute a quorum for the transaction of the business of the division and the decision of a majority of the division shall constitute the decision of the panel and of the Board, provided that all three panel chairmen signify that in their opinion a review by the three panel chairman is not required; if a majority of the members of a division are unable to agree on a decision, or if one or more panel chairmen do not waive review, determination of the appeal shall be made by a majority of the three panel chairmen: *Provided*, That on request of the appellant, and subject to the concurrence of the Department concerned, an appeal involving $5,000 in amount or less shall be decided under an accelerated procedure by a single member of the Board subject to such concurrence by a division or panel as the Department may direct.

7. It shall be the bounden duty and obligation of the members of the Armed Services Board of Contract Appeals to decide appeals to the best of their knowledge and ability in accordance with applicable contract provisions, and in accordance with the law pertinent thereto.

8. The Board shall have all powers necessary and incident to the proper performance of its duties, and with the approval of the pertinent Assistant and Under Secretaries of the Army, Navy, and Air Force shall adopt its own methods of procedure, and rules and regulations for its conduct and for the preparation and presentation of appeals and issuance of opinions. The Board is authorized to communicate directly with any person whomsoever in regard to any matter which relates to the business of the Board. The Departments shall jointly or severally maintain an adequate staff of military and/or civilian legal and clerical personnel who shall prepare and present the contentions of the Departments in relation to appeals filed with the Board. It shall not be necessary for the Board, unless it otherwise desires, to communicate with more than one trial attorney in each of the three Departments concerning the preparation and presentation of appeals and the procurement of all Department records deemed by the Board to be pertinent thereto.

9. Any member of the Board or any examiner, designated by the president of the Board with the concurrence of the chairman of the pertinent panel, shall be authorized to hold hearings, examine witnesses, receive evidence and argument, and report the evidence and argument to the designated division of the panel for consideration and determination of the appeal.

10. A vacancy in the Board or any panel or division thereof shall not impair the powers nor affect the duties of the Board, panel, or division, nor of the remaining members of the Board, panel, or division, respectively. In the absence of a panel chairman, the member of the panel designated by him to act in his absence shall serve as acting chairman of the panel. Should no such designation be made, the member present on the panel having seniority of service as a member shall serve as acting chairman of the panel.

11. The Board shall have a seal bearing the following inscription: "Armed Services Board of Contract Appeals". This seal shall be affixed to all authentications of copies of records, and to such other instruments as the Board may determine.

12. There shall be a recorder of the Board, who shall be a person trained in the law. He shall be appointed by the president of the Board. Each Department will provide such materials, facilities, and nonmember clerical and professional personnel to its respective panel as may be required by the panel in the performance of its duties as a panel of the Armed Services Board of Contract Appeals. The salaries of the members and of the nonmember personnel as originally assigned to the Board shall be borne by the respective Departments upon the basis of an original agreement between the three Departments. The apportionment may be reconsidered from time to time but not more often than once per year. In each case heard the expense of transcripts, travel, and per diem of members, and the expense of witnesses required by the Government shall be absorbed by the Department which executed the contract under which the appeal was taken.

13. The Board will submit to the respective Secretaries of the three Departments and the Assistant Secretary of Defense (Supply and Logistics), during the month of July of each year, a report containing an account of its transactions and proceedings for the preceding fiscal year. During each calendar month the Board shall forward a report of its proceedings for the preceding calendar month to the pertinent Assistant and Under Secretaries of the Departments and the Assistant Secretary of Defense (Supply and Logistics). Such reports shall disclose the number of appeals received, cases heard, opinions rendered, current reserve of pending matters, and such other information as shall be deemed pertinent by the president of the Board or requested by the Assistant or Under Secretaries.

14. All appeals pending before the Board under the "Charter for the Armed Services Board of Contract Appeals" which became effective on May 1, 1949 shall continue to be subject to the jurisdiction of the Board under this revised Charter.

15. This revised Charter will become effective February 1, 1959.

PART II—RULES OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS

PREFACE TO RULES

The Armed Services Board of Contract Appeals is the authorized representative of the Secretaries of the Army, Navy, and Air Force in hearing, considering and determining as fully and finally as might each of the Secretaries:

(a) Appeals by contractors from decisions on disputed questions by contracting officers or their authorized representatives or by other authorities pursuant to the provisions of Armed Services contracts requiring the determination of appeals by the head of a Department of the Armed Services or by his duly authorized representative or board, or pursuant to the provisions of any directive whereby the Secretary of a Department of the armed services has granted a right of appeal not contained in the contract;

(b) Appeals by armed services contractors pursuant to section 13(c)(1)(i) and section 17(c) of the Contract Settlement Act of 1944.

When an appeal is taken pursuant to a dispute clause in a contract which provides only for appeals from decisions on questions of fact, the Board may, in its discretion, hear, consider, and decide all questions of law necessary for the complete adjudication of the issue. Unless the contract provides otherwise, when in the consideration of an appeal it appears that a claim for unliquidated damages is involved therein, the Board, insofar as the evidence permits, makes findings of fact with respect to such claims without expressing opinion on questions of liability.

When a contract requires the Secretary of a Department of the armed services personally to render a decision on the matter in dispute, the Board submits its findings and recommendations to the Secretary of the Department.

There are three panels of the Board: The Army, Navy, and Air Force panels. In general, appeals are assigned for decision to the panel of the Department whose contract or procurement is directly involved. Each of the panels acts in divisions, which normally consist of three or more members of the panel. Hearings may be held by a division, by a designated member, or by a duly authorized examiner. The decision of a majority of a division constitutes the decision of the panel and of the Board, provided that all three panel chairmen signify that in their opinion a review by the three panel chairmen is not required. If a majority of the members of a division do not agree upon a decision, or if one or more of the panel chairmen do not waive review, determination of the appeal is made by a majority of the three panel chairmen. However, on request of the appellant and subject to the concurrence of the Department concerned, an appeal involving $5,000 in amount or less may be decided by a single member of the Board subject to such concurrence by a division or panel of the Board as the Department concerned may direct.

SCOPE OF RULES

1. *General.* Except to the extent otherwise provided pursuant to Rule 31 (Optional Accelerated Procedure for Cases Involving $5,000 in Amount or Less), Rules 2 through 30 govern the procedure in all cases before the Board. They shall be construed for the purpose of securing just and inexpensive determination of appeals without unnecessary delay. All pleadings provided for hereunder shall be so construed as to do substantial justice.

PROCEEDINGS PRELIMINARY TO HEARINGS

2. *Appeals, how taken.* Notice of an appeal must be in writing, and the original, together with two copies, may be filed with the contracting officer from whose decision the appeal is taken. The notice of appeal must be mailed or otherwise filed within the time specified therefor in the contract or allowed by applicable provision of directive or law.

3. *Notice of appeal, contents of.* A notice of appeal should indicate that an appeal is thereby intended, and should identify the contract (by number), the department and agency or bureau cognizant of the dispute, and the decision from which the appeal is taken. The notice of appeal should be signed personally by the appellant (the contractor making the appeal), or by an officer of the appellant corporation or member of the appellant firm, or by the contractor's duly authorized representative or attorney. The complaint referred to in Rule 5 may be filed with the notice of appeal.

4. *Duties of contracting officer.* When a notice of appeal in any form has been received by the contracting officer he shall endorse thereon the date of mailing or the date of receipt if otherwise filed and within 10 days shall forward the notice of appeal, and the complaint if filed therewith, to the Board. The contracting officer shall promptly thereafter compile and transmit to counsel for the Government copies of all documents pertinent to the appeal, including the following:

(1) The findings of fact and the decision from which the appeal is taken, and the letter or letters or other documents of claim in response to which the decision was issued;

(2) The contract and pertinent plans, specifications, amendments, and change orders;

(3) Correspondence between the parties and other data pertinent to the appeal;

(4) Transcripts of any testimony taken during the course of the proceedings on the matter in dispute prior to the filing of the notice of appeal with the Board;

(5) Such additional information as the contracting officer may consider material.

When the Board has received the original notice of appeal the Board will promptly so advise the contractor and the contracting officer, and will forward to the contractor a copy of these rules.

NOTE: Attention is invited to Rule 31, below, providing an Optional Accelerated Procedure for cases involving $5,000 in amount or less. It is the duty of the contracting officer to advise the contractor of the Optional Accelerated Procedure in connection with an appeal involving $5,000 in amount or less.

5. *Complaint.* Within 30 days after receipt of notice of docketing by the Board of the appeal, or within such longer period of time as may be allowed by the Board, the appellant shall file with the Board, if not previously filed with the notice of appeal, a complaint setting forth simple, concise and direct statements of each of his claims showing that he is entitled to relief including the dollar amount claimed. If the amount claimed involves $5,000 or less, he may, in his complaint, request that the appeal be handled under the Optional Accelerated Procedure (Rule 31). Each claim shall be stated with as much particularity as is practical. No technical form is required, but each claim should be separately identified. Documentary evidence in support of claims may be filed as exhibits to the complaint. All documents filed as exhibits to the complaint shall be plainly listed and identified in the complaint. An original and three copies of the complaint shall be filed. Upon receipt thereof the recorder of the Board shall serve a copy of the complaint on counsel for the Government.

6. *Answer.* Within 60 days after service of the complaint, or within such longer period of time as may be allowed by the Board, counsel for the Government shall prepare and file with the Board an answer thereto. The answer shall set forth simple, concise, and direct statements of the Government's defenses to each claim asserted by appellant. Each defense shall be stated with as much particularity as is practical. Defenses which go to the jurisdiction of the Board may be included in the answer, or may be raised by motion pursuant to the provisions of Rule 10. If the appellant requests recourse to the Optional Accelerated Procedure (Rule 31), the answer shall contain a statement as to whether such request is concurred in by the Department concerned. Counsel for the Government shall at the same time file with the Board the following documents, which shall be plainly listed and identified:

(1) The findings of fact if any and the decision from which the appeal is taken, and the letter or letters or documents of claim in response to which the decision was issued by the contracting officer;

(2) The contract and pertinent plans, specifications, amendments, and change orders.

Documentary evidence in support of the Government's defenses may be filed as exhibits to the answer. All documents filed as exhibits to the answer shall be plainly listed and identified in the answer. An original and three copies of the answer shall be filed with the Board. Upon receipt thereof the Recorder shall serve a copy of the answer on appellant or his attorney.

7. *Appeal file; inspection of file.* The notice of appeal, the complaint and exhibits attached thereto, the answer and exhibits attached thereto, and the documents required to be filed therewith pursuant to Rule 6, all papers filed by the parties with the Board pursuant to these rules, and all correspondence exchanged between the Board and the parties or their attorneys shall constitute the appeal file, which shall be available for inspection by appellant and Government counsel at the offices of the Board. Prior arrangements for inspection of the file should be made with the recorder of the Board.

8. *Amendments of pleadings.* At any time before oral hearing or before submission of a case by the parties without an oral hearing the Board in its discretion may permit a party, within the proper scope of the appeal, to amend its complaint or answer, upon conditions just to both parties. The Board upon its own initiative or upon application by a party may, in its discretion, order a party to make a more definite statement of its complaint or answer, or to reply to an answer. When issues within the proper scope of the appeal but not raised by the complaint and answer are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised therein. Such amendment of the complaint and answer as may be necessary to cause them to conform to the evidence may be made upon motion at any time, even after decision, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the hearing on the ground that it is not within the issues made by the complaint and answer, the hearing member or examiner may allow the pleadings to be amended within the proper scope of the appeal and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the hearing member or examiner that the admission of such evidence would prejudice him in maintaining his case or defense upon the merits. The hearing member or examiner may, however, grant

a continuance to enable the objecting party to meet such evidence.

9. *Trial briefs.* The Board in its discretion may order the submission of trial briefs prior to assignment of a case for oral hearing.

10. *Motions to dismiss.* Defenses which go to the jurisdiction of the Board may be raised by motion. Filing of motions to dismiss for lack of jurisdiction shall not be unreasonably delayed. The Board, however, has the right at any time to recognize its lack of authority to proceed in a particular case. Motions to dismiss for lack of jurisdiction shall, on application of either party, be heard and determined before oral hearing on the merits unless the Board orders that determination of the motion be deferred pending oral hearing on both the merits and the motion.

11. *Failure to state a case.* In the event, after completion of the pleadings, the Board finds that appellant has failed to state a case on which any relief could be granted by the Board, the Board may give notice to appellant to show cause why the appeal should not be dismissed on the ground that no useful purpose would be served by setting the case for oral hearing on the merits. Appellant, in such event, will be afforded the opportunity to be heard orally for the purpose of showing cause why the appeal should not be dismissed on that ground, and if appellant so desires to move to amend the complaint, within the proper scope of the appeal. If the Board thereafter finds appellant has failed to show cause, and finds that the complaint, with such amendments as may be offered by appellant, fails to state a case on which the Board could grant relief, the appeal shall be dismissed.

12. *Depositions.* Depositions which a party desires to take for the purpose of offering in evidence shall be taken in accordance with the procedure set forth in Appendix to Rules.

13. *Interrogatories to parties; inspection of documents; admission of facts.* Under appropriate circumstances, but not as a matter of course, the Board will entertain applications for permission to serve written interrogatories upon the opposing party, applications for an order to produce and permit the inspection of designated documents, and applications for permission to serve upon the opposing party a request for the admission of specified facts. Such applications shall be received and approved only to the extent and upon such terms as the Board in its discretion considers to be consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay, and essential to the proper pursuit of that objective in the particular case.

14. *Prehearing conferences.* In any case the Board in its discretion, upon its own initiative or upon the application of one of the parties, may call upon the parties or their attorneys or representatives to appear before a member or examiner of the Board for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) Such other matters as may aid in the disposition of the appeal.

The presiding member or examiner, at the conclusion of such a conference, shall make such order as in his discretion is found to be appropriate with reference to action taken at the conference, amendments allowed or to be made to the pleadings, agreements made by the parties as to any of the matters considered, and limitation of issues for trial.

15. *Service of papers.* Service of papers in all proceedings pending before the Board may be made personally, or by mailing the same in a sealed envelope, registered, return receipt requested, with postage prepaid, addressed to the party upon whom service shall be made, and the date of the registry receipt shall be the date of service. Waiver of the service of any papers may be noted thereon or on a copy thereof, or on a separate paper, signed by the parties or their attorneys and filed with the Board. When any party has appeared by attorney, service upon the attorney will be deemed proper service upon such party.

HEARINGS

16. *Where and when held.* (a) Hearings will be held at the office of the Board in Washington, D.C., unless it is otherwise ordered by the Board. Hearings will not ordinarily be held elsewhere, but if a request therefor is seasonably made and good cause therefor appears, the Board may order a hearing to be held at another location. (For hearings under the Optional Accelerated Procedure, see Rule 31.)

(b) Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals and other factors. However, on request or motion of either party the Board, in its discretion, may advance the hearing for good cause shown.

17. *Notice of hearings.* Appellant and Government counsel shall be given at least 15 days' notice of the time and place of hearing.

18. *Submission without a hearing.* If either party does not wish to appear or be represented at a hearing, the Board shall be so advised. A party who so advises the Board may submit a brief within 20 days after the date assigned for the hearing, or within such other period of time as may be allowed by the Board. If both parties advise the Board that an oral hearing is not desired, briefs may be submitted by the parties within such period of time as may be allowed by the Board. (For submission on the record under the Optional Accelerated Procedure, see Rule 31.)

19. *Absence of parties or counsel.* The unexcused absence of a party or his authorized representative at the time and place set for the hearing will not be the occasion for delay. In such event the hearing will proceed and the case will be regarded as submitted by the absent party.

20. *Nature of hearings.* Hearings shall be as informal as may be reasonably allowable and appropriate under all the circumstances. Appellant and Government counsel may offer at a hearing on the merits such relevant evidence[1] as they deem appropriate and as would be admissible under the generally accepted rules of evidence applied in the courts of the United States in nonjury trials, subject, however, to the exercise of reasonable discretion by the presiding member or examiner in supervising the extent and manner of presentation of such evidence. Letters or copies thereof, affidavits, or other evidence, not ordinarily admissible under the generally accepted rules of evidence, may be received in evidence at the discretion of the presiding member or examiner. The weight to be attached to evidence presented in any particular form will be determined by the Board in the exercise of reasonable discretion under all the circumstances of the particular case. Stipulations of fact agreed upon by the parties may be regarded and used in evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may, however, in any case, require additional evidence.

21. *Examination of witnesses.* Witnesses before the Board will be examined orally under oath or affirmation, unless the facts are stipulated or the Board member or examiner shall otherwise order. If the testimony of a witness is not given under oath the Board may, if it seems expedient, warn the witness that his statements may be subject to the provisions of Title 18, United States Code, sections 287, 1001; section 19 of the Contract Settlement Act of 1944 (41 U.S.C. 119), and any other provisions of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

22. *Copies of papers.* When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.

23. *Briefs.* All briefs shall be filed within 20 days after conclusion of the hearing, or within such other period of time as may be allowed by the Board.

[1] For procedure to be followed in taking depositions, see "Appendix to Rules."

24. *Transcript of proceedings.* Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders except that under the Optional Accelerated Procedure the stenographic record will not be transcribed unless requested by either of the parties. Transcripts of the proceedings shall be supplied to the parties at such rates as may be fixed by contract between the Board and the reporter. If the proceedings are reported by an employee of the Government, the appellant may receive transcripts upon payment to the Government at the same rates as those set by contract between the Board and the independent reporter.

25. *Withdrawal of exhibits.* After a decision has become final the Board may, upon request and after notice to the other party, in its discretion permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitution of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

REPRESENTATION

26. *The contractor.* An individual appellant may appear before the Board in person, a corporation by an officer thereof, a partnership or joint venture by a member thereof, or by an attorney at law duly licensed in any State, Commonwealth, Territory, or in the District of Columbia. The Board may authorize a contractor to appear by a duly authorized representative other than those mentioned in a special case, but for the purposes of that case only.

27. *Status of Government counsel.* Government counsel designated by the various departments to represent the departments, agencies, and bureaus cognizant of the disputes brought before the Board may in accordance with their authority represent the interests of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given appellant or his attorney in the form specified by the Board from time to time. Government counsel may, when it appears to them that there are questions of fact as to which there is no substantial controversy, agree with appellant or his attorney as to such facts by written stipulation or otherwise. Whenever at any time it appears that appellant and Government counsel are in agreement as to disposition of the controversy, the Board may suspend further processing of the appeal in order to permit reconsideration by the contracting officer: *Provided, however,* That if the Board is advised thereafter by either party that the controversy has not been disposed of by agreement the case shall be restored to the Board's calendar for hearing without loss of position.

DECISIONS

28. (a) Decisions of the Board will be made in writing and authenticated copies thereof will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions (except those required for good cause to be held confidential and not cited as precedents) shall be available to public inspection at the offices of the Board in Washington, D.C.

(b) Under the Optional Accelerated Procedure the decision shall be as brief as the circumstances permit and will ordinarily state only a summary of the facts and issues and the conclusions of the Board member. Such decision will not be published or distributed except to the parties and will not be regarded or cited as precedent for future cases. The Board member will also prepare a written memorandum of the basis for his decision which will not be published or distributed. Such memorandum will be available for examination by the parties.

MOTIONS FOR RECONSIDERATION

29. A motion for reconsideration, if filed by either party, shall set forth specifically the ground or grounds relied upon to sustain the motion, and shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

DEFINITIONS

30. (a) As used in these rules the term "contracting officer" includes any officer or other authority whose decision may be reviewed by the Board pursuant to the Board's charter.

(b) As used in these rules the term "Board" means the full Board, president of the Board, panel, chairman of a panel, member, or examiner, as may be appropriate, except that in Rule 11 the term "Board" refers to action of the Board by written decision in accordance with the procedures set forth in the Board's charter.

31. *Optional accelerated procedure for cases involving $5,000 in amount or less.* An appeal involving $5,000 in amount or less shall be processed under this rule at the request of the appellant, subject to the concurrence of the Department concerned. Under this rule:

(a) The appeal will be decided by a single member of the Board, designated by the chairman of the panel concerned, who shall have for this purpose all the authority and power of the full Board to hear, consider, determine and reconsider the matter, subject to such concurrence by a division or panel as the Department concerned may direct.

(b) The appeal shall be deemed submitted for decision on the record unless the appellant or the Government, within 10 days after receipt of the Government's answer by the appellant, requests the Board to schedule an oral hearing.

(c) Such oral hearing shall be fixed at such time and place as shall be agreeable to the parties and to the chairman of the panel concerned, taking into consideration any request therefor of the appellant.

(d) For the purpose of this rule, the amount involved in an appeal shall be the difference between the amount of the appellant's claim as stated in his complaint and the amount, if any, determined by the decision from which the appeal is taken.

(e) If the Board member assigned to the case under this rule determines that the amount involved exceeds or may exceed $5,000, the parties shall be so informed, and the appeal shall be disposed of in accordance with Rules 2–30, inclusive. The determination so made shall be final and conclusive.

EFFECTIVE DATE AND APPLICABILITY

32. These revised rules shall take effect on the first day of the second month following the month in which they are approved by the cognizant Assistant Secretaries of the Department of the Army, Department of the Navy, and the Department of the Air Force. Except as otherwise directed by the Board, these rules shall not apply to appeals which have been docketed prior to their effective date.

APPENDIX TO RULES

DEPOSITIONS

1. *When depositions may be taken.* After an appeal has been docketed by the Board either party may take the testimony of any person by deposition upon oral examination or written interrogatories for use as evidence in the appeal proceedings.

2. *Before whom taken.* Depositions to be offered in evidence before the Board may be taken before and authenticated by any person authorized by the laws of the United States, or by the laws of the place where the deposition is taken, to administer oaths.

3. *Written interrogatories.* (a) A party desiring to take the deposition of any person upon written interrogatories shall serve them upon the opposite party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the person before whom the deposition is to be taken. Within 15 days thereafter the party so served may serve cross interrogatories upon the party proposing to take the deposition.

(b) A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the person designated in the notice who should proceed promptly to take the testimony of the witness in response to the interrogatories.

4. *Oral interrogatories.* When either party desires to take the testimony of any person by deposition upon oral examination, unless the parties stipulate as to the time and place where the deposition is to be taken and the name of the person before whom it is to be taken and the name and address of the witness, such party shall give the opposite party at least 15 days written notice of the time and place where such deposition will be taken and the name and address and official title of the person before whom it is proposed to take the deposition, and the name and address of the witness.

5. *Form and return of deposition.* Each deposition should show the docket number and the caption of the proceedings, the place and date of taking, the name of the witness, and the names of all persons present. The persons taking the deposition shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness, and shall enclose the original deposition and exhibits in a sealed packet with postage and other transportation prepaid and forward same to the Recorder, Armed Services Board of Contract Appeals.

6. *Introduction in evidence.* Either party to the appeal may offer depositions in evidence. The entire deposition must be offered unless otherwise stipulated by the parties or directed by the Board.

§ 30.2 Appendix B—Manual for control of Government property in possession of contractors.

PART I—INTRODUCTION

101. *Scope of manual.* This manual sets forth basic requirements to be observed by the Departments of the Army, Navy and Air Force, for establishing and maintaining control over Government property furnished to or acquired by contractors pursuant to the terms of their contracts.

102. *Applicability of Manual.* This Manual applies to all types of contracts, leases and bailments pursuant to which Government property is furnished to or acquired by a contractor.

103 *Definitions.* As used in this Manual, the following terms have the meanings shown:

103.1 "Contract administrator" means the individual duly designated by appropriate authority in the Military Departments to administer the contract. In the case of the Army and Air Force, usually this is a contracting officer, and in the Navy, usually this is the authorized representative of the contracting officer having administrative cognizance over the contract.

103.2 "Property administrator" means the Government representative responsible to the contract administrator for:

(i) Reviewing and approving the contractor's property control procedures;

(ii) Examining the records maintained by the contractor of Government property;

(iii) Making usage analyses of Government property; and

(iv) The maintenance of such Government property records as are required by this Manual.

103.3 "Government property" means all property owned by or leased to the Government, or acquired by the Government under the terms of a contract; except that property to which the Government has acquired a lien or title solely as a result of partial, advance or progress payments shall not for the purpose of this Manual be classified as Government property. With this exception, Government property includes both Government-furnished property and contract-acquired property, as defined below:

(i) Government-furnished "property" is property in the possession of or acquired directly by the Government and subsequently delivered or otherwise made available to the contractor; and

(ii) "Contractor-acquired property" is property procured or otherwise provided by the contractor for the performance of a contract, pursuant to the terms of which title is vested in the Government.

The term "provide," as used in the context of such phrases as "Government property provided to the contractor" and "Government-provided property," is intended to include both Government-furnished property and contractor-acquired property.

103.4 "Industrial facility" means property, other than material and special tooling, of use for the performance of a contract or subcontract, including real property and rights therein, buildings, structures, improvements, and plant equipment.

103.5 "Industrial property," as distinguished from military property, means any contractor-acquired or Government-furnished property, including materials, special tooling, and industrial facilities furnished or acquired in the performance of a contract or subcontract.

103.6 "Real property," for purposes of accounting classification means (i) land and rights therein, (ii) utility distribution systems, and (iii) buildings, structures, and improvements thereto, excluding plant equipment.

103.7 "Utility distribution system" means a system (including distribution and transmission lines, substations, and installed equipment forming an integral part of the system), by which gas, water, steam, electricity, sewerage, or other utility services are transmitted between (i) the outside of the building or structure in which the services are used, and (ii) the point of origin or disposal, or the connection with some other system. For the purpose of this Manual it does not include communication services.

103.8 "Plant equipment" means personal property of a capital nature (consisting of machinery, equipment, furniture, vehicles, machine tools, and accessory and auxiliary items, but excluding special tooling used or

capable of use in the manufacture of supplies or in the performance of services or for any administrative or general plant purpose.

103.9 Minor plant equipment means an item of plant equipment having a unit value of less than $200 and other plant equipment, regardless of cost, when so designated by the Government.

103.9 "Minor plant equipment" means an item of plant equipment having a unit value of less than $100 and other plant equipment, regardless of cost, when so designated by the Government.

103.10 "Production equipment" means those items of plant equipment located within a manufacturing, processing, assembly or service establishment and used for cutting, abrading, grinding, shaping, forming, joining, measuring, testing, heating or treating production materials or work in process.

103.11 "Machine tools" mean those items of production equipment which are power-driven, non-portable machines used for cutting, abrading, grinding, shaping or forming metal.

103.12 "Accessory item" means an item which facilitates or enhances the operation of plant equipment but which is not essential for its operation, such as remote control devices.

103.13 "Auxiliary item" means an item without which the basic unit of plant equipment cannot operate, such as motors for pumps and machine tools.

103.14 Special tooling means all jigs, dies, fixtures, molds, patterns, special taps, special gauges, special test equipment, other special equipment and manufacturing aids, and replacements thereof, acquired or manufactured by the contractor for use in the performance of a contract, which are of such a specialized nature that, without substantial modification or alteration, their use is limited to the production of such supplies or parts thereof, or the performance of such services, as are peculiar to the needs of the Government. The term does not include: (i) Items of tooling or equipment acquired by the contractor prior to the contract, or replacements thereof, whether or not altered or adapted for use in the performance of the contract, (ii) consumable small tools, or (iii) general or special machine tools, or similar capital items.

103.15 "Material" means property which may be incorporated into or attached to an end item to be delivered under a contract or which may be consumed or expended in the performance of a contract. It includes, but is not limited to, raw and processed material, parts, components, assemblies, and small tools and supplies which may be consumed in normal use in the performance of the contract.

103.16 "Salvage" means property recoverable for further use or which, because of its worn, damaged, deteriorated, or incomplete condition, or specialized nature, has no reasonable prospect of sale or use as serviceable property without major repairs or alterations but which has some value in excess of its scrap value.

103.17 "Scrap" means property that has no reasonable prospect of being sold except for the recovery value of its basic material content.

103.18 "Property account" means the official records of the Government property provided to a contractor by a Department, which are established and maintained under the provisions of this Manual. Separate property accounts will be maintained either on an individual contract basis or contractor basis.

103.19 "Stock record" means a perpetual inventory form of record which shows, by nomenclature, the quantities received and issued, and the balances on hand.

PART II—GENERAL PROVISIONS

200. *Scope of part.* This part sets forth (i) the duties and responsibilities of Government representatives and contractors charged with the control of Government Property, (ii) the sources from which Government Property may be received or acquired, and (iii) the manner in which Government Property will be controlled, both physically and administratively.

201. *Duties and responsibilities of the Contract Administrator with respect to the control of Government Property.* (a) The function of the Contract Administrator with respect to the control of Government Property is to insure that the Contractor complies with the provisions of the contract and this manual pertaining to Government Property and that the Government's interests therein are fully protected at all times. He shall require the Contractor to (i) exercise reasonable care and proper usage of all Government Property, (ii) establish and maintain adequate records therefor and (iii) maintain controls that will assure the recording of all debits and credits to the property record as hereinafter defined.

(b) It is incumbent upon the Contract Administrator to familiarize himself with the provisions of this manual and the contract involved.

(c) He shall require the Contractor to correct all deficiencies in complying with the provisions of the contract and this manual pertaining to Government Property.

(d) He shall take proper action with respect to recommendations of the Property Administrator relating to usage or control of Government Property.

(e) He shall make appropriate written findings with respect to the Contractor's liability for Government Property lost, damaged, destroyed, or unreasonably consumed in production, as may be required by this manual.

202 *Designation of property administrator.*

(a) A property administrator shall be designated for each Government contract involving Government property. In appropriate cases the contract administrator may be assigned the additional duty of property administrator. An assistant property administrator may be appointed for specific contracts. The property administrator will not be required to post a bond by virtue of the duty as property administrator.

(b) It is the policy of the Department of Defense that a single property administrator shall be designated for all Department of Defense contracts performed at one location by a contractor. Within each Military Department, responsibility for the direction, administration, and review of the property administration interchange program shall be assigned to a single office at the Department level. This office, designated to direct and administer the program, shall have the following responsibilities:

(1) Implementation of pertinent Department of Defense directives, instructions, and regulations.

(2) Review of field contract administration activities for compliance with Department of Defense and Departmental directives pertinent to the property administration interchange program.

(3) Resolution of intra-departmental interchange problems.

(4) Resolution of inter-departmental interchange problems.

(c) Property administration interchange agreements shall be negotiated only by those offices administering current contracts or orders with the contractors. Property administration interchange agreements shall be effected at the field level between representatives of the procuring activities having contract administration responsibility. In formulating such agreements, the following factors, among others, shall be considered:

(1) Comparative value and types of Government property in the possession of the contractor and the Government property yet to be provided under Government contracts.

(2) Existence of a resident property administrator or accessibility of an itinerant property administrator.

(3) Other contract administration functions which may have a bearing on property administration such as quality control, industrial mobilization planning and audit cognizance.

(d) Based on the above factors, when two or more offices are equally concerned with property administration at a contractor's location, that office which has contracts or orders that indicate the greatest continuous duration of future interest in Government property shall be given primary consideration for property administration cognizance. When all contracts or orders of the Department designated to perform property administration have been completed at a contractor's location, that Department shall cease to have cognizance at that location unless all military contracts providing for Government property are scheduled to expire within a succeeding three-month period. When all contracts or orders of the Department designated to perform property administration have been completed at a contractor's location where other Departments continue to perform contracts or orders which are not scheduled to expire within a succeeding three-month period, property administration cognizance shall be determined by negotiation between those Departments which continue to perform contracts or orders providing for Government property with the suppliers. When a Department that previously had no contracts at a contractor's location at the time the existing property administration interchange agreement was made acquires a contract providing for Government property of greater continuous duration of future interest than those involved in the existing agreement, the cognizance agreement shall be reviewed and either confirmed or revised by a new agreement.

(e) When the Departments are unable to reach property administration interchange agreements, those unresolved property administration assignments shall be referred to the Assistant Secretary of Defense (Supply and Logistics) for resolution.

(f) Property administration functions required by the Armed Services Procurement Regulation will be performed by the designated property administrator who will generally follow his current operating procedures in performing property administration. Each Department will provide the designated property administrator with manuals, instructions, and directives pertaining to reports and documentation required by contractual provisions. Documents and records required by this Appendix B for property administration of current contracts, subcontracts, and purchase orders involving Government property will be provided to the designated property administrator prior to the effective date of an agreement. Copies of such contracts, subcontracts, and purchase orders and amendments thereto or extracts of property provisions thereof will accompany the transmittal. The name of the individual designated as property administrator for such contracts will be furnished to the procuring activity performing contract administration. New contracts, subcontracts, purchase orders and amendments thereto or extracts of property provisions thereof where Government property is involved will be transmitted to the designated property administrator. Contracts containing the Special Tooling clause (§ 13.504) will likewise be transmitted to the designated property administrator for necessary surveillance.

(g) The designated property administrator may correspond directly with the contractor

and appropriate Department of Defense personnel on matters pertaining to Government property. The contract administrator will keep the property administrator informed as to all communications, correspondence, and actions affecting property matters under the assigned contract.

(h) Property administration interchange agreements shall be in the general format shown below. Where required, appendices shall be added thereto.

1. Purpose: This is a local interchange agreement providing for property administration at the designated contractor's location by (Department-procurement office) in accordance with ASPR B–202.

2. Effective date: This agreement becomes effective on _____.

3. Contractor's location:

(Identify specific location covered by this agreement)

_____

_____

(Signatures of authorized representatives of Departments concerned)

203 *Duties and responsibilities of the property administrator.*

(a) The property administrator shall familiarize himself with the provisions of this Manual and the contract provisions pertaining to Government property.

(b) He shall, as the authorized representative of the contract administrator or administrators, insure compliance with the contract requirements relative to Government property and insure fulfillment of all obligations imposed by this Manual. He shall at the inception of the contract review and approve in writing the contractor's property control records and procedures.

(c) He shall be responsible for property management data required by contractual provisions and, when acting as property administrator under a property administration interchange agreement, shall also provide the procuring activities concerned with such management data and with information, documents, records, and assistance required by the latter for conformance with the provisions of this Appendix B and/or Departmental procedures, including, but not limited to, those for the following purposes:

(1) Public vouchers.

(2) Fulfilling managerial and financial requirements for property report cards.

(3) Marking and identification of property under Departmental procedures.

(4) Disposition of excess.

(5) Approval of the contractor's property control procedures and records.

(6) Relief from responsibility for property loss, damage, unauthorized use, or unreasonable consumption.

(7) Final property clearance.

(d) He shall examine the documents, including but not limited to consumption or usage reports, adjustment reports, reports of spoilage or shrinkage, sales, shipments, transfers, etc., recorded by the contractor in the property account, to the extent necessary to establish the correctness and completeness of such records.

(e) It shall be his responsibility to determine whether the contractor is using Government property for the purposes authorized by the contract, and whether the contractor is exercising the degree of care in the handling of Government property prescribed in the contract.

(f) He shall make usage analyses to determine the reasonableness of the consumption and expenditure of Government property. Control records shall be utilized in the performance of the usage survey and, to the extent necessary, selective physical inspections of Government property shall be made in the appropriate states of production.

(g) He shall periodically examine all property records to determine whether such records reflect the status of Government property and indicate compliance with the provisions of the contract and applicable directives. He shall report promptly in writing to the contract administrator any noncompliance by the contractor with the contract provisions and applicable directives.

(h) He shall advise the contract administrator on all property matters.

204. *Duties and responsibilities of the Contractor.* The Contractor shall be directly responsibile for and accountable for all Government Property in accordance with the provisions of the contract. The Contractor shall maintain and make available such records as are required by Part III of this manual and must account for all Government Property until relieved of responsibility therefor in accordance with the procedures as set forth in Part IV of this manual. Liability for loss, damage, or excessive use of property in a given instance will necessarily depend upon all the circumstances surrounding the particular case and must be considered and determined in accordance with the provisions of the contract. The Contractor shall furnish all necessary data substantiating any request for discharge from responsibility.

205. *Sources from which Government property may be furnished or acquired.*

205.1 *Military installations or other Contractors' plants.* Government Property may be shipped to a Contractor from military installations or plants of department contractors.

205.2 *Direct purchase by the Contractor.* Direct purchases shall be subject to a determination by the Contract Administrator that the items are allocable to the contract involved and are reasonably necessary therefor. For purposes of property control within the scope of this manual, it shall be considered that property purchased by a Contractor, for which reimbursement is to be requested, becomes Government Property upon its receipt by the Contractor. This provision shall not be deemed to alter or modify contractual provisions relating to passage of title.

205.3 *Withdrawal from Contractor-owned stores.* For purposes of property control, within the scope of this manual, property withdrawn from Contractor-owned stores, for direct charge to the contract, shall be considered Government Property at the time of approval of the claim for reimbursement, or at the time of issuance for use of such property for the performance of the contract, whichever is earlier.

205.4 *Contract provisions, termination, contract changes.* Pursuant to specific contractual provisions, or as a result of termination of a contract, or change orders issued under a contract, the Government may acquire title to property.

205.5 *Advance, progress, or partial payments.* Pursuant to the terms of a contract the Government may acquire title to property upon the making of advance, progress, or partial payments to the Contractor. Property to which the Government has acquired a lien or title solely as a result of partial, advance, or progress payments shall not be subject to the provisions of this manual.

206. *Segregation or commingling of Government property and contractor's property.* Ordinarily Government property, particularly material, will be segregated and kept physically separate from contractor-owned property at all times. There will be occasions, however, where commingling of property would be advantageous to the Government. Commingling may be allowed in the following types of cases:

(a) Where a production line is engaged solely in Government work, contractor and Government special tooling and plant equipment may be commingled. Normally no approval is required for commingling in this category, but the property administrator may prohibit it at his discretion if it is considered not to be in the best interest of the Government.

(b) Where Government-furnished special tooling or plant equipment is held by a contractor in storage, pending its use under a production contract, the property administrator may give permission in writing for commingling with contractor property.

(c) Where approved by the property administrator in connection with research and development contracts.

(d) Any commingling, other than that set forth herein, may be permitted by the property administrator upon the approval of the cognizant Department in accordance with Departmental procedures.

207 *Physical inventories.*

207.1 *Before termination or completion.* It shall be the responsibility of the property administrator to review and approve the type and frequency of physical inventories to be taken. In this respect, he may accept and approve in writing the contractor's established procedures if he determines that they adequately protect the interests of the Government and are in conformity with applicable regulations.

207.2 *Upon termination or completion.* Upon termination or completion of a contract, a physical inventory adequate for disposal purposes shall be required of all Government property applicable to the contract in the custody, control or possession of the contractor.

207.3 *Joint physical inventories or selective examinations under 207.1 and 207.2.* (a) The property administrator may, at his discretion, require physical inventories to be taken jointly by his designated representatives and the contractor.

(b) In lieu of a joint physical inventory, selective examinations of the inventory being taken by the contractor may be made when the property administrator determines that such procedure is more economical and will adequately protect the interests of the Government. When selective examinations are made they must embrace a representative number of items in the account and must adequately cover, by class and price range, all Government property involved.

207.4 *Quantitative and monetary control.* As directed or required by proper authority, the contractor's physical inventories shall be prepared on both a quantitative and monetary basis and classified by categories such as material, special tooling, plant equipment, etc.

207.5 *Discrepancies.* Any discrepancies disclosed as a result of inventorying will be adjusted in accordance with the provisions of Part III and Part IV of this § 30.2.

PART III—RECORDS TO BE MAINTAINED

301. *General.* (a) In order satisfactorily to perform work under a Government contract, a contractor must maintain some form of control records for all Government property, whether furnished to or acquired by a contractor for the account of the Government. It is the Government's policy to designate and use such records as the official contract records, and not to maintain duplicate property control records, other than those required by paragraph 303, and other than industrial facility records. With respect to industrial facilities, additional records shall be maintained by the property administrator or higher headquarters, as may be required by the respective Departments pursuant to paragraph 303.1 (c). Exceptions to the above policy may be authorized by the respective Departments in special circumstances, such as where the administrative expense of maintaining Government personnel at the contractor's plant or providing frequent official visits to the plant would exceed the cost of maintaining Gov-

ernment records or otherwise not be in the best interest of the Government.

(b) The contractor's property control records and procedures shall be reviewed and approved in writing by the property administrator at the inception of the contract. Any necessary corrective action will be required of the contractor prior to approval. Such corrective action will normally be effected by the property administrator through mediation with the contractor. Where corrective action would involve substantial increased costs or where agreement as to the corrective action is not reached through mediation, the differences will be referred to the contract administrator.

(c) The contractors' property control system will provide financial accounts for Government-owned industrial facilities in the contractors' possession or control. The system will be subject to internal control standards and be supported by property records for such facilities; in the manner described in paragraph 304.

(d) The official records shall be kept in such condition that at any stage of completion of the work under a contract the status of Government property may be readily ascertained.

(e) Separate property records for each contract are desirable but a consolidated property record may be maintained provided that the consolidated record provides the information set forth in paragraph 304.

(f) Property records shall be established for any usable components which are permanently removed from items of Government property, as a result of modification, or otherwise.

(g) Special tooling and equipment fabricated from materials which are the property of the Government will be appropriately recorded immediately upon fabrication. Special tooling and equipment fabricated from materials which are the property of the contractor will be appropriately recorded at the time title passes to the Government.

(h) Departmental policies will govern the establishment of monetary levels below which individual item records of plant equipment will not be required.

302. *Pricing.* Property records shall show a unit price for each item.

(a) The unit price of Contractor-acquired property shall be determined in accordance with the system established by the Contractor in conformance with sound accounting principles and consistently applied.

(b) The unit price of Government furnished property shall be determined by the Government and furnished to the Contractor.

303. *Records to be maintained by Government personnel.*

303.1 *Records of specific contracts where property is involved.* (a) Where a contract provides for the use of Government Property a copy of the contract shall be made available or furnished to the Property Administrator.

(b) The property administrator shall maintain a record of each contract assigned to him for property administration. That record shall contain the following minimum information:

(i) Contract number and name of Contractor.

(ii) Type of contract (CPFF, fixed price, research and development, etc.)

(iii) End item to be produced or services to be performed, and the points of inspection and acceptance.

(iv) Record of amendments and changes pertaining to Government Property.

(v) Listing and type of all subcontracts which involve Government Property.

(vi) Provisions of contract pertaining to liability of the Contractor for loss, damage or improper use of Government Property.

(vii) Record of Contract Administrators and dates of tenure.

(viii) Record of Property Administrators and dates of tenure.

(ix) Record of Plant Representatives (or Officers-in-Charge) and dates of tenure.

(x) Record of written approval of Contractor's property control procedures.

(xi) Record of deviations granted in property procedures. (The deviations granted shall be in accordance with procedural regulations issued by each department.)

(xii) Record of property audits and inspections performed by the responsible agencies in each department.

(xiii) Records of property inspections during production and usage analyses performed.

(xiv) Record of any deficiencies found in property control and the corrective action taken.

(xv) Interim and final clearance data for Government property.

(c) The contractor shall be required to furnish written receipts for all, or specific classes of Government provided property only in those instances where such action is determined by the property administrator to be essential for maintenance of minimum acceptable property controls. In these instances the property administrator shall maintain for each contract a file of such documents or property record cards. Where such evidence of receipt is required, it shall be provided by the contractor not later than the time he submits his application for payment (public voucher). Otherwise, the property administrator shall utilize the contractor's file of documents evidencing receipt and not establish a duplicate file.

(d) The Property Administrator shall maintain for each contract a file containing copies of all instruments affecting relief from responsibility for Government Property.

303.2 *Control records to be maintained.* The Property Administrator shall maintain a system of file control that will permit the ready location of any document that he is required by this section to maintain.

303.3 *Record of completed products.* The Property Administrator shall maintain a record of all completed products produced under the contract, based upon authenticated receiving reports or processed vendors' shipping documents, as follows:

(a) When there is no lapse of time between Government inspection and acceptance of the completed products and shipment from the plant site, the records shall, as a minimum, consist of a summarization of quantities accepted and shipped. When end items are accepted by the Government and stored with the Contractor the record shall show the quantities stored and location.

(b) Some contracts provide that completed products are to be retained by the Contractor for further use under the contract. Upon acceptance of such items they shall be considered to be "Government-furnished property" and shall be recorded as prescribed in paragraph 304.

304 *Records to be maintained by the contractor.* It is the contractor's responsibility (i) to maintain adequate control records in accordance with the requirements of this Manual of all Government property provided under a contract, including property provided under such contract as may be in the possession or control of a subcontractor, and to establish separate property accounts to be located at the subcontractor's plant and at the contractor's secondary site when so requested by the property administrator.

304.1 *Records of material.* All Government material furnished to the contractor, as well as all other material, title to which has passed to the Government, by reason of allocation from contractor-owned stores, or by reason of purchase by the contractor for direct charge to a Government contract, or otherwise, shall be recorded in accordance with the contractor's property control system, as follows:

(a) *Contractor's property control system.* Except as provided in (d) below, the contractor's property control system shall be such as to provide the following information:

(1) Contract number.
(2) Nomenclature or description of item.
(3) Quantity received.
(4) Quantity issued.
(5) Balance on hand.
(6) Posting reference.
(7) Date received or issued.
(8) Unit price.
(9) Location.
(10) Disposition action taken.

(b) *Consolidated stock record.* Where a contractor has more than one Government contract, under which Government property is provided, a consolidated record for materials may be authorized, provided the total quantity of any item is allocated to each contract by contract number and each requisition of property from contractor-owned stores is charged to the contract on which the property is to be used. The supporting document or issue slip shall show the contract number or equivalent code designation to which the issue is charged.

(c) *Custodial records.* Custodial records shall be maintained for tool crib items, guard force items, protective clothing and other items issued for the use of individuals in the performance of their work under the contract.

(d) *Use of receipt and issue documents.* Based on a determination of the property administrator in accordance with paragraph 301(b), the contractor may maintain in lieu of "stock records" a file of appropriately cross-referenced documents representing receipt, issue, and adjustments of Government-provided material in performance of a Government contract. Such determination shall be consistent with generally accepted accounting practices and a low frequency of receipt and issue of the items of material specified (i.e. usually issued directly upon receipt). Accordingly:

(i) The property administrator may authorize this method of property control for Government-provided material, including but not limited to items used in manufacturing or maintenance, office supplies, etc.; and

(ii) This method of property control may be used for research and development contracts.

304.2 *Records of special tooling.* The Contractor's property control system shall be such as to provide the following minimum information regarding each item of Government owned special tooling:

(a) Contract number or equivalent code designation.
(b) Nomenclature or description of item.
(c) Identification number and item on which used.
(d) Quantity received or fabricated.
(e) Voucher reference.
(f) Location.
(g) Disposition action taken.
(h) Unit price or group price.

304.3 *Records of plant equipment.* Plant equipment shall be accounted for by individual item except as provided in subparagraphs (a), (b), (c), and (d) below. The form of property records to be maintained for plant equipment will include as a minimum the information prescribed by Exhibit A.

(a) *Record of accessory and auxiliary equipment.* Individual records for accessory and auxiliary equipment which is attached to or otherwise a part of an item of plant equipment and which is required for its normal operation need not be maintained, but the description of such accessory and auxiliary equipment shall be entered on the respective plant equipment records.

(b) *Record of manufacturing systems.* Where plant equipment and accessory type

items are assembled and interconnected to form a single operating unit designed to perform continuously the same manufacturing process, such equipment may, for property and inventory control purposes, be grouped and reported as a single item of plant equipment on one plant equipment record in lieu of an individual record for each component comprising the item of plant equipment. This does not preclude the requirement for completely describing the component items nor does it preclude the use of more than one plant equipment record when additional space is required.

(c) *Record of minor plant equipment.* Summary stock records, rather than individual item records, shall be maintained for minor plant equipment, except in cases where individual item records are necessary for effective control.

(d) *Record of plant equipment costing between $200 and $500.* Summary stock records, rather than individual item records, shall be maintained for plant and production equipment costing between $200 and $500, except in cases where individual item records are necessary for effective control.

304.4 *Records of real property.* Records of real property shall consist of maps, drawings, plans and specifications supplemented, where necessary, to reflect building installations such as heating, electrical, sanitary, ventilating, drainage, sprinkler systems, etc. Appropriate changes will be made to the records to reflect alterations, additions, or extensions to real property. Where the maps, drawings, plans, and specifications do not adequately reflect descriptive data as to building installations, supplemental records will be maintained. The foregoing records (a) will be complete, (b) will show the original cost of the property and improvements, and the cost of changes and additions thereto, and (c) will be appropriately indexed.

304.5 *Records of scrap.* The contractor shall maintain separate or consolidated records of all scrap or salvage generated. These records may be in accordance with the contractor's system of scrap or salvage control, if approved in writing by the property administrator, who shall take into consideration the need for protecting the Government's interest in the proration, disposition and allocation of proceeds resulting therefrom.

304.6 *Records of related data and information.* Except as provided in this subparagraph, the requirements of this § 30.2 are not applicable to manufacturing or assembly drawings, installation, operation, repair or maintenance instructions, or other similar data and information furnished by the Government to the contractor. The contractor shall maintain property control and accountability with respect to such Government-furnished Property in accordance with sound industrial practice.

304.7 *Financial control accounts.* The contractors' property control system should be such as to provide annually, or not more often than quarterly if required in accordance with Departmental procedures, the dollar amounts of Government-owned industrial facilities in the following classifications.

(i) Land and rights therein,

(ii) Utility distribution systems,

(iii) Buildings, structures and improvements thereto, excluding plant equipment,

(iv) Plant equipment, excluding production equipment and minor plant equipment, and

(v) Production equipment.

The contractor's accounts will be susceptible to local reconciliation in total and subtotals as to whether contractor-acquired or Government-furnished.

305. *Numbering property accounts.* A property account, consisting of records maintained either by a Contractor or Government personnel, shall be assigned a property account number.

PART IV—MISCELLANEOUS PROVISIONS

401. *Identification.* All Government property shall be recorded and identified as such by the contractor promptly upon receipt, and it shall remain so identified so long as it remains in the custody, control or possession of the contractor.

(a) *Extent of Identification.*

(i) As a general rule, all Government material and minor plant equipment shall be identified as Government property except in those cases where:

(A) No materials or minor plant equipment of the same type at the same location are owned by the contractor, its employees, or other contracting agencies;

(B) Adequate physical control is maintained over tool-crib items, guard force items, protective clothing and other items issued for use by individuals in the performance of their work under the contract;

(C) Property is of bulk type or by its general nature of packing or handling precludes adequate marking, as may be determined by the property administrator; and

(D) Where property is commingled, as authorized by paragraph 206 hereof.

(ii) Government-owned special tooling shall be marked with the designation of the Military Department responsible for funding and control of such tooling, as follows: Army—"USA", Navy—"USN", and Air Force—"USAF", unless it is determined that such marking will damage the special tooling or is otherwise impracticable. Marking and identification procedures may be expanded by the Department having cognizance over the tooling to include end item reference, drawing number, and such other information as may be desired in a given case.

(iii) Unless already marked in accordance with these instructions, all Government-owned plant equipment, including industrial reserve plant equipment, shall be marked by the contractor with an identification number, except minor plant equipment; or when the size of the equipment or nature of the material for which it is made makes it impracticable, and in which case such item will be assigned an identification number for record purposes, which number shall be shown in the plant equipment property record; or the equipment is accessory or auxiliary and attached to or otherwise a part of an item of plant equipment and is required for its normal operation (see 30.2, 304.3(a)), in which case such item shall be entered and described on the record of the equipment to which it is attached or of which it is otherwise a part. Once an identification number has been affixed to an item of plant equipment, the identification will be permanent and will not be changed so long as the equipment remains under the control of the same Military Department (but see (iv) below). Identification shall be effected by affixing a metal, fibre, plastic or other plate directly to the equipment; by using indelible ink, acid or electric etch, steel dies, or any other legible, permanent, conspicuous, and tamperproof method. Identification shall consist of the following markings:

(A) An indication of Government-ownership and of the Military Department responsible for funding and control of the plant equipment, as follows: Army—"USA", Navy—"USN", and Air Force—"USAF"; however, the identification "U. S." property shall not be changed solely to conform to the provisions of this paragraph;

(B) A two-part identification number, furnished by the Government, consisting solely of numerals except as provided in (C) below. The first part shall be the property account number, and the second part shall be a serial number. In case plant equipment furnished by the Government is already identified as property of a Military Department, no change shall be made in the markings, except as provided in (iv) below; and

(C) In the case of items included within a standard Departmental registration system, for example, automotive, construction, or weight-handling equipment, application for a proper registration number will be made to the cognizant Department, which number shall be used in lieu of any other identification number.

(iv) Government identification markings shall be removed prior to sale or scrapping. The markings so removed shall be shown on the appropriate documents involved. In the case of a transfer of funding and control responsibilities to other Military Departments, new identification markings, in accordance with the requirements of (ii) or (iii) above, may be affixed upon receipt of the equipment by the receiving Military Department.

(b) *Recording identification numbers.* Assigned property identification numbers will be recorded on all applicable receiving documents, shipping documents, and other documents pertaining to the property accounts.

402. *Contractor's responsibility and liability.*

402.1 *Contractor's responsibility.* A Contractor shall be responsible for all Government Property in his custody or control in accordance with the terms of the contract. The Contractor may be relieved of responsibility for Government Property by any of the following methods, subject in any case to specific contract provisions or specific instructions of the Contract Administrator within the scope of the contract:

(a) *Consumption of property in the performance of the contract.* To the extent that the Property Administrator determines that property has been consumed or expended for proper purposes and in reasonable amounts in the performance of the contract, the Contractor shall be relieved of responsibility for such property.

(b) *Retention by the Contractor.* This may occur when the contract is completed, terminated or otherwise amended during the performance of the contract. The Contractor shall be relieved of responsibility for all property which has been retained by the Contractor, provided that the Government shall have approved the retention and shall have been reimbursed therefor in accordance with the terms of the contract or applicable regulations.

(c) *Sale of property.* The Contractor shall be relieved of responsibility for Government Property sold pursuant to the instructions of the Contract Administrator, in accordance with applicable regulations, provided, however, that the proceeds from such sale shall have been received by or credited to the Government.

(d) *Shipment of Government Property from a Contractor's plant.* The Contractor shall be relieved of responsibility when Government Property is shipped from the Contractor's plant pursuant to the instructions of the Contract Administrator.

(e) *Written advice of Contract Administrator.* The Contractor shall be relieved of responsibility for Government Property lost, damaged, destroyed, or consumed, in excess of that normally anticipated in the manufacturing or processing operation, as the result of appropriate action by the Contract Administrator to determine the liability of the Contractor, provided such determination is furnished to the Contractor in writing and the Government shall have been adequately reimbursed when appropriate.

402.2 *Contractor's liability.* Subject to the terms of the contract, the contractor may be liable when shortages of Government property are disclosed or when Government property is lost, damaged, or destroyed, or when there is evidence of unreasonable use or consumption of Government property as measured by the allowances provided for by the terms of the contract or the appropriate bill of materials.

(a) The property administrator will require the contractor to report to him in all cases of loss, damage, or destruction of Government property in his possession, as soon as such fact becomes known. The property administrator will forward such report to the contract administrator, together with his own report of the facts of the case and his recommendations thereon. If the contract administrator is the contracting officer, or a designated representative of the contracting officer for that purpose, he will thereupon determine the contractor's liability in accordance with the terms of the contract; otherwise he will forward the papers to the contracting officer, who will make such determination. In making any such determination, consideration will be given to the reports and recommendations submitted and to any additional facts which the contractor may submit. The contractor and the property administrator shall be furnished with a written copy of such determination. A copy shall be held in the files of the contract administrator.

(b) When inventory adjustments or usage analyses disclose consumption of property which is considered unreasonable by the property administrator, or when instances of losses, damages to, or destruction of Government property, which have not been reported by the contractor, are discovered by the property administrator, he shall prepare a statement of the items and amount of loss involved. This statement shall be furnished the contractor for investigation and written justification. Further procedure shall be in accordance with that prescribed in subparagraph (a) above.

(c) When completed products or end items are lost, destroyed, or damaged beyond repair while such property is in the physical possession or control of the Contractor, the action prescribed in subparagraph (a) above will be required.

(d) Where it has been determined that the Contractor is liable to the Government by reason of the loss, damage or destruction of Government Property, a letter of advice from the Contract Administrator shall be considered a valid credit to the official Government Property records, provided:

(i) When the Contractor pays by check, the letter of advice will identify the check received by number, date and amount.

(ii) When settlement is made by offset against amounts due the Contractor on a public voucher, the letter of advice will cite the actual voucher (Form 1034) on which the deduction is made.

(iii) When collection of the claim against the Contractor is to be made by the fiscal office designated for the contract, the letter of advice will have attached thereto a copy of the document used by the Contract Administrator to notify the fiscal office to effect collection.

(e) When property is rendered unserviceable by damages thereto, the letter of advice from the Contract Administrator will be considered a valid credit to the Government Property account when supported by or appropriately cross-referenced to shipping documents or listing covering proper disposition of the unserviceable items.

402.3 *Shipment and receipt of Government-furnished property.* In the case of Government property shipped to a contractor's plant from a military installation or from another contractor's plant, the contractor becomes responsible therefor upon delivery of the property to his plant. The shipping activity shall furnish the property administrator, who is responsible for the receiving contractor's property account, with copies of the documents necessary to permit the property account to reflect the transaction. On receipt of the property the contractor, where required, shall furnish the property administrator with documented evidence of such receipt. The property administrator shall take the action necessary to insure that his records of these transactions are complete. (See pars. 203 and 204.)

403. *Control of scrap and salvage.*

403.1 *Sources.* Scrap originating from Government Property includes, but is not limited to, the following:

(a) Cutting and processing waste, such as chips, cuttings, borings, turnings, short ends, circles, trimmings, clippings, and remnants.

(b) Spoiled partially manufactured materials, parts and assemblies, including parts and assemblies damaged in handling or installation.

(c) Materials and supplies and small tools and special equipment, when worn out or damaged beyond repair, used packaging materials, and nonreusable containers.

(d) Unusable materials generated in the performance of overhaul or conversion contracts.

403.2 *Salvage.* A salvage procedure shall be established by the Contractor whereby all Government Property that can be salvaged shall be recovered and returned to Government stock.

403.3 *Approval of scrap procedure by the property administrator.* The property administrator shall review and approve the contractor's procedures relating to the physical control of scrap and records relating thereto. The property administrator shall periodically assure by actual inspection and selective examinations that the approved procedures are effectively carried out. If the property administrator determines that corrective measures are necessary to protect the Government's interests, he shall so advise the contractor and the contractor shall take necessary corrective action. Where corrective action would involve substantial increased costs or where agreement as to the corrective action is not reached through mediation, the differences will be referred to the contractor administrator.

Plant Equipment Record Card			ANAF Serial No.			ANAF Stock or Classification No.	
Contractor's Name and Address							
Contractor's Accounting No.			Date of Card			Contract No.	
Type of Equipment							
Capacity							
(Name) Manufacturer's (Address)							
Model No.			Year Built		Mfr. Serial No.		FOB Cost
Motor Data	AC/DC	Cycls	Volt	HP	Phase	RPM	Disposition
Main Drive							
Aux.							
Aux.							

EXHIBIT A

403.4 *Minimum essential requirements of Contractor's scrap procedures.* The Contractor's scrap procedures must include the following:

(a) Appropriate inspection and study to determine the possibility of reworking or converting for use the scrap resulting from operations under the contract.

(b) Prompt accumulation of all scrap generated and storage thereof under adequate protection.

(c) Recording the scrap data on appropriate records to provide the basis for control by weight or other unit of measure.

(d) Sorting of scrap, including the segregation of the various metals to prevent contamination.

(e) Recording of scrap shipments out of the plant.

403.5 *Segregation of scrap and salvage.* Where the Contractor is engaged in work involving both Government-owned and Contractor-owned materials from which scrap of a uniform nature is produced, the physical segregation of Government-owned and Contractor-owned scrap and salvage may be impracticable. In such cases, the Contract Administrator shall require proration of such basis as will result in equitable recovery by the Government.

404. *Auditing property accounts.* Records of Government property shall be audited by the Departments as frequently as conditions warrant. Any such audit or audits may take place at any time during the performance of the contract, upon completion or termination of the contract, or at any time thereafter. These audits will include records maintained by the contractor and such records as may be maintained by Government personnel in connection with such property. The property administrator and the contractor shall make all property records, including correspondence related thereto, available to the auditors.

§ 30.3 Appendix C—Manual for control of Government property in possession of nonprofit research and development contractors.

PART I—INTRODUCTION

100 *Scope of manual.* This Manual sets forth basic requirements to be observed by the Departments of the Army, Navy and Air Force, for establishing and maintaining control over Government property furnished to or acquired by contractors in the case of research and development contracts with educational or other nonprofit organizations, provided such contracts are executed on a nonprofit basis.

101 *Reserved.*

102 *Applicability of manual.* Subject to paragraph 100 above, this Manual applies to all types of contracts, leases, and bailments, pursuant to which Government property is furnished to or acquired by a contractor.

103 *Definitions.* As used in this Manual, the following terms have the meanings shown:

103.1 "Educational or other nonprofit organization" means any corporation, foundation, trust, or institution operated for scientific or educational purposes, not organized for profit, no part of the net earnings of which inures to the profit of any private shareholder or individual.

103.2 "Contract administrator" means the individual duly designated by appropriate authority in the Military Departments to administer the contract. In the case of the Army and Air Force, this is a contracting officer, and in the Navy, the authorized representative of the contracting officer having administrative cognizance over the contract.

103.3 "Government property" means all property owned by or leased to the Government, or acquired by the Government under the terms of a contract, except that property to which the Government has acquired a lien or title solely as a result of partial, advance or progress payments shall not for the purpose of this Manual be classified as Government property. With this exception, Government property includes both Government-furnished property and contractor-acquired property, as defined below:

(a) "Government-furnished property" is property in the possession of or acquired directly by the Government and subsequently delivered or otherwise made available to the contractor; and

(b) "Contractor-acquired property" is property procured or otherwise provided by the contractor for the performance of a contract, pursuant to the terms of which title is vested in the Government.

The term "provide" as used in the context of such phrases as "Government property provided to the contractor" and "Government-provided property" is intended to include both Government-furnished property and contractor-acquired property.

103.4 *Classification of Government property.* The terms "classify" and "classification" as used herein with reference to Government property refer to the grouping of property into different categories having different incidents. For purposes of this Manual, Government property shall be classified in five categories, defined as follows:

(a) "Real property" means lands, buildings, structures, improvements and appurtenances thereto. It does not include plant equipment as defined in subparagraph (b) below.

(b) "Plant equipment" means personal property of a capital nature (consisting of machinery, equipment, furniture, vehicles, machine tools, and accessory and auxiliary items, but excluding special tooling) used or capable of use in the manufacture of supplies or in the performance of services or for any administrative or general plant purpose.

(c) Minor plant equipment means an item of plant equipment having a unit value of less than $200.00 and other plant equipment, regardless of cost, when so designated by the Government.

(d) "Material" means property which may be incorporated into or attached to, an end item to be delivered under a contract or which may be consumed or expended in the performance of a contract. It includes, but is not limited to, raw and processed material, parts, components, assemblies, and small tools and supplies which may be consumed in normal use in the performance of the contract.

(e) "Special tooling" means all jigs, dies, fixtures, molds, patterns, special taps, special gauges, special test equipment, other special equipment and manufacturing aids, and replacements thereof, acquired or manufactured by the contractor for use in the performance of a contract, which are of such a specialized nature that, without substantial modification or alteration, their use is limited to the production of such supplies or parts thereof, or the performance of such services, as are peculiar to the needs of the Government. The term does not include (i) items of tooling or equipment acquired by the contractor prior to the contract, or replacements thereof, whether or not altered or adapted for use in the performance of the contract, (ii) consumable small tools, or (iii) general or special machine tools, or similar capital items.

103.5 "Property administrator" means the Government representative responsible to the contract administrator for reviewing and approving the contractor's property control procedures, for examining the records maintained by the contractor of Government property, for making usage analyses of Government property, and for the maintenance of such Government property records as are required by this Manual.

103.6 "Property account" means the official records of the Government property provided to a contractor by a Department, which are established and maintained under the provisions of this Manual. Separate property accounts will be maintained either on an individual contract basis or contractor basis.

103.7 "Stock record" means a perpetual inventory form of record which shows by nomenclature the quantities received and issued, and the balances on hand.

103.8 "Salvage" means property which is recovered for further use or which, because of its worn, damaged, deteriorated, or incomplete condition, or specialized nature, has no reasonable prospect of sale or use as serviceable property without major repairs or alterations, but which has some value in excess of its scrap value.

103.9 "Scrap" means property that has no reasonable prospect of being sold except for the recovery value of its basic material content.

PART II—GOVERNMENT ADMINISTRATIVE PROVISIONS

200. *Scope of part.* This part sets forth (i) the duties and responsibilities of Government representatives charged with the control of Government property (ii) the sources from which Government property may be received or acquired, and (iii) the instructions to Government representatives for the control of Government property, both physically and administratively.

201. *Duties and responsibilities of the Contract Administrator with respect to the control of Government property.* (a) The function of the Contract Administrator with respect to the control of Government property is to insure that the Contractor complies with the provisions of the contract and this manual pertaining to Government property and that the Government's interests therein are fully protected at all times. He shall require the Contractor to (i) exercise reasonable care and proper usage of all Government property, (ii) establish and maintain adequate records therefor, and (iii) maintain controls that will assure the recording of all debits and credits to the property record as hereinafter defined.

(b) It is incumbent upon the Contract Administrator to familiarize himself with the provisions of this manual and the contract involved.

(c) He shall require the Contractor to correct all deficiencies in complying with the provisions of the contract and this manual pertaining to Government property.

(d) He shall take proper action with respect to recommendations of the Property Administrator relating to usage or control of Government property.

(e) He shall make appropriate written findings with respect to the Contractor's liability for Government property lost, damaged, destroyed, or unreasonably consumed, as may be required by this manual.

202. *Designation of property administrator.* (a) A property administrator shall be designated for each Government contract involving Government property. In appropriate cases the contract administrator may be assigned the additional duty of property administrator. An assistant property administrator may be appointed for specific contracts. The property administrator will not be required to post a bond by virtue of the duty as property administrator.

(b) It is the policy of the Department of Defense that a single property administrator shall be designated for all Department of Defense contracts performed at one location by a contractor. Within each Military Department, responsibility for the direction, administration and review of the property administration interchange program shall be assigned to a single office at the Department level. This office, designated to direct and administer the program, shall have the following responsibilities:

(1) Implementation of pertinent Department of Defense directives, instructions and regulations.

(2) Review of field contract administration activities for compliance with Department of Defense and Departmental directives pertinent to the property administration interchange program.

(3) Resolution of intra-departmental interchange problems.

(4) Resolution of inter-departmental interchange problems.

(c) Property administration interchange agreements shall be negotiated only by those offices administering current contracts or orders with the contractors. Property administration interchange agreements shall be effected at the field level between representatives of the procuring activities having contract administration responsibility. In formulating such agreements, the following factors, among others, shall be considered.

(1) Comparative value and types of Government property in the possession of the contractor and the Government property yet to be provided under Government contracts.

(2) Existence of a resident property administrator or accessibility of an itinerant property administrator.

(3) Other contract administration functions which may have a bearing on property administration such as quality control, industrial mobilization planning and audit cognizance.

(d) Based on the above factors, when two or more offices are equally concerned, with property administration at a contractor's location, that office which has contracts or orders that indicate the greatest continuous duration of future interest in Government property shall be given primary consideration for property administration cognizance. When all contracts or orders of the Department designated to perform property administration have been completed at a contractor's location, that Department shall cease to have cognizance at that location unless all military contracts providing for Government property are scheduled to expire within a succeeding three-month period. When all contracts or orders of the Department designated to perform property administration have been completed at a contractor's location where other Departments continue to perform contracts or orders which are not scheduled to expire within a succeeding three-month period, property administration cognizance shall be determined by negotiation between those Departments which continue to perform contracts or orders providing for Government property with the suppliers. When a Department that previously had no contracts at a contractor's location at the time the existing property administration interchange agreement was made acquires a contract providing for Government property of greater continuous duration of future interest than those involved in the existing agreement, the cognizance agreement shall be reviewed and either confirmed or revised by a new agreement.

(e) When the Departments are unable to reach property administration interchange agreements, those unresolved property ad-

ministration assignments shall be referred to the Assistant Secretary of Defense (Supply and Logistics) for resolution.

(f) Property administration functions required by the Armed Services Procurement Regulation will be performed by the designated property administrator who will generally follow his current operating procedures in performing property administration. Each Department will provide the designated property administrator with manuals, instructions, and directives pertaining to reports and documentation required by contractural provisions. Documents and records required by this Appendix C for property administration of current contracts, subcontracts, and purchase orders involving Government property will be provided to the designated property administrator prior to the effective date of an agreement. Copies of such contracts, subcontracts, and purchase orders and amendments thereto or extracts of property provisions thereof will accompany the transmittal. The name of the individual designated as property administrator for such contracts will be furnished to the procuring activity performing contract administration. New contracts, subcontracts, purchase orders and amendments thereto or extracts of property provisions thereof where Government property is involved will be transmitted to the designated property administrator.

(g) The designated property administrator may correspond directly with the contractor and appropriate Department of Defense personnel on matters pertaining to Government property. The contract administrator will keep the property administrator informed as to all communications, correspondence, and actions affecting property matters under the assigned contract.

(h) Property administration interchange agreements shall be in the general format shown below. Where required, appendices shall be added thereto.

1. Purpose. This is a local interchange agreement providing for property administration at the designated contractor's location by (Department-procurement office) in accordance with ASPR C–202. _____

2. Effective date. This agreement becomes effective on _____.

3. Contractor's location (Identify specific location covered by this agreement)

_____

_____

(Signature of authorized representatives of Departments concerned)

203 *Duties and responsibilities of the property administrator.*

(a) The property administrator shall familiarize himself with the provisions of this Manual and the contract provisions pertaining to Government property.

(b) He shall, as the authorized representative of the contract administrator or administrators, insure compliance with the contract requirements relative to Government property and insure fulfillment of all obligations imposed by this Manual. He shall at the inception of the contract review and approve in writing the contractor's property control records and procedures.

(c) He shall examine any documents, including but not limited to consumption or spoilage or shrinkage, sales, shipments, transfers, etc., recorded by the Contractor in the property accounts, to the extent necessary to establish the correctness and completeness of such records.

(d) It shall be his responsibility to report to the Contracting Officer any instances of what he deems to be improper usage of Government property. To the extent necessary to fulfill this function selective physical inspections of Government property shall be made.

(e) He shall periodically examine property records to determine whether such records usage reports, adjustment reports, reports of reflect the status of Government property and indicate compliance with the provisions of the contract and applicable directives. He shall report promptly in writing to the Contract Administrator any non-compliance by the Contractor with the contract provisions and applicable directives.

(f) He will observe the following procedure in connection with loss, damage, and destruction of Government property in the possession of the contractor:

(i) He will require the contractor to report to him all cases of loss, damage, or destruction of Government property in his possession, as soon as such fact becomes known. He will forward such report to the contract administrator, together with his own report of the facts of the case and his recommendation thereon. If the contract administrator is the contracting officer, or a designated representative of the contracting officer for that purpose, he will thereupon determine the contractor's liability, in accordance with the terms of the contract; otherwise he will forward the papers to the contracting office, who will make such determination. In making any such determination, consideration will be given to the reports and recommendations submitted and to any additional facts which the contractor may submit. The contractor and the property administrator shall be furnished with a written copy of such determination. A copy shall be held in the files of the contract administrator.

(ii) When inventory adjustments or usage analyses disclose consumption of property which is considered unreasonable by the property administrator, or when instances of losses, damages to, or destruction of Government property which have not been reported by the contractor, are discovered by the property administrator, he shall prepare a statement of the items and amount of loss involved. This statement shall be furnished the contractor for investigation and written justification. Further procedure shall be in accordance with that prescribed in (i) above.

(iii) When end items are lost, destroyed, or damaged beyond repair while such items are in the physical possession or control of the Contractor, the action prescribed in subparagraph (i) above will be required.

(iv) Where it has been determined that the Contractor is liable to the Government by reason of the loss, damage, or destruction of Government property, a letter of advice from the Contract Administrator shall be considered a valid credit to the official Government property records, provided:

(A) When the Contractor pays by check, the letter of advice will identify the check received by number, date, and amount.

(B) When a settlement is made by offset against amounts due the Contractor on a public voucher, the letter of advice will cite the actual voucher (Form 1034) on which the deduction is made.

(C) When collection of the claim against the Contractor is to be made by the fiscal office designated for the contract, the letter of advice will have attached thereto a copy of the document used by the Contract Administrator to notify the fiscal office to effect collection.

(v) When property is rendered unserviceable by damage thereto, the letter of advice from the Contract Administrator will be considered a valid credit to the Government property account when supported by or appropriately cross-referenced to shipping documents or listing covering proper disposition of the unserviceable items.

(g) He shall take the action necessary to insure that his records of the transactions discussed in paragraph 204 below are complete.

(h) He shall review and approve the contractor's scrap procedures and records as provided in paragraph 212 of this manual.

(i) He shall advise the Contract Administrator on all property matters.

204 *Shipment and receipt of government-furnished property.* In the case of Government property shipped to a contractor's plant from a military installation or from another contractor's plant, the contractor becomes responsible therefor upon delivery of the property to his plant. The shipping activity shall furnish the property administrator, who is responsible for the receiving contractor's property account, with copies of the documents necessary to permit the property account to reflect the transaction. On receipt of the property the contractor, where required, shall furnish the property administrator with documented evidence of such receipt. The property administrator shall take the action necessary to insure that his records of these transactions are complete. (See par. 203.)

205. *Sources from which Government property may be furnished or acquired.*

205.1 *Military installations or other Contractor's plants.* Government property may be shipped to a Contractor from military installations or plants or department contractors.

205.2 *Direct purchase by the Contractor.* Direct purchases shall be subject to a determination by the Contract Administrator that the items are allocable to the contract involved and are reasonably necessary therefor. For purposes of property control within the scope of this manual, it shall be considered that property purchased by a Contractor, for which direct reimbursement is to be requested, becomes Government property upon its receipt by the Contractor. This is "Contractor-acquired" property. This provision shall not be deemed to alter or modify contractual provisions relating to passage of title.

205.3 *Withdrawal from Contractor-owned stores.* For purposes of property control, within the scope of this manual, property withdrawn from Contractor-owned stores, for direct charge to the contract, shall be considered Government property at the time of approval of the claim for reimbursement, or at the time of issuance for use of such property for the performance of the contract, whichever is earlier. This also is "Contractor-acquired" property.

205.4 *Contract provisions, termination, contract changes.* Pursuant to specific contractual provisions, or as a result of termination of a contract, or change orders issued under a contract, the Government may acquire title to property.

205.5 *Advance, progress, or partial payments.* Pursuant to the terms of a contract the Government may acquire title to property upon the making of advance, progress, or partial payments to the Contractor. Property to which the Government has acquired a lien or title solely as a result of partial, advance, or progress payments shall not be subject to the provisions of this manual.

206. [Reserved]

207. *Contractor's records.*

207.1 *General policy.* In order to satisfactorily perform work under a Government contract, a contractor must maintain adequate control records for all Government property, whether furnished to or acquired by a contractor for the account of the Government. It is the Government's policy to designate and use such records as the official contract records, and not to maintain duplicate property control records, other than those required by paragraph 213, and other than such real property and plant equipment records as may be required by the respective departments. Exceptions to this policy may be authorized by the respective departments in special circumstances, such as where the administrative expense of main-

taining Government personnel at the Contractor's plant or providing frequent official visits to the plant would exceed the cost of maintaining Government records or otherwise not to be in the best interest of the Government.

207.2 *The Contractor's property control system.* The contractor's property control system shall be reviewed and approved in writing by the property administrator. If any corrective action is necessary, it will be required of the contractor prior to approval. Such corrective action will normally be effected through mediation with the contractor. Where corrective action would involve substantial increased costs or where agreement as to the corrective action is not reached through mediation, the differences will be referred to the contract administrator. Consistent with the provisions of the contract, the principles and requirements stated in the subparagraphs below shall be observed by the property administrator in approving the contractor's property control system.

207.3 *Records for material in stores.* For material maintained by the Contractor in stocks or stores, the Contractor's property control system shall be such as to provide the following information:

(i) Contract number, or equivalent code designation.

(ii) Nomenclature or description of item.

(iii) Quantity received.

(iv) Quantity issued.

(v) Balance on hand.

(vi) Posting reference.

(vii) Date received or issued.

(viii) Price.

(ix) Disposition action taken.

207.4 *Records for material issued directly upon receipt, for minor plant equipment, and for special tooling.* For material, whether Government-furnished or contractor-acquired, issued by the contractor directly so as to be considered expended under the contract, for minor plant equipment, and for special tooling, the Government invoices, contractor's purchase documents, or other documentary evidence of acquisition and issue, will be accepted as adequate property control records.

207.5 *Records of plant equipment.* (a) Individual records of each item of plant equipment shall be maintained unless summary stock records are maintained as provided in (b) below. The following information shall be available from such records.

(i) Name and address of contractor.

(ii) Name and address of manufacturer of the plant equipment item.

(iii) Model number of the plant equipment item.

(iv) Year built or acquired.

(v) Serial number.

(vi) U. S. Government identification number.

(vii) Description and classification of the item.

(viii) Acquisition reference and date.

(ix) Disposition reference and date.

(x) Contract number under which acquired.

(xi) Cost (F. O. B. Manufacturer).

(b) Summary stock records may be maintained in lieu of individual property records for those items of plant equipment having a value of less than $500 each when designated by the contract administrator in accordance with departmental procedures. Full consideration should be made of the contractor's existing property control system. The following information shall be available from such records:

(i) Name and address of contractor.

(ii) Description and classification of the item.

(iii) Acquisition reference and date.

(iv) Disposition reference and date.

(v) Contract number under which acquired.

(vi) Cost (F. O. B. Manufacturer).

(vii) Quantity received.

(viii) Quantity transferred or disposed of as authorized in par. 203 (f) above.

(ix) Balance on hand.

In addition, where appropriate as determined by the contract administrator, the serial number or the U. S. Government identification number for each item shall be recorded in a permanent manner on the summary stock record and upon disposition a line drawn through the appropriate number.

207.6 *Records of real property.* Records of real property shall be as provided in paragraph 306 (d).

207.7 *Separated components.* Property records shall be required for any usable components which are permanently removed from items of Government property, as a result of modification, or otherwise, to the same extent as would be the case if such components had been provided separately by the Government; provided that the Contractor shall not be required to augment his property control system for the purpose of recording minor plant equipment, special tooling or materials, except upon return to stocks or stores.

207.8 *Custodial records.* Custodial records normally should be maintained for items issued from tool cribs or the like, guard force items, protective clothing and other items issued for the use of individuals in the performance of their work under the contract. However, it is the general policy of the Government to accept for the control of Government property of the above character the same system as employed by the Contractor for his own similar property.

207.9 *Consolidated stock record.* Where a Contractor has more than one Government contract, under which Government property is provided, a consolidated record for materials may be authorized, provided the total quantity of any item is allocated to each contract by contract number and each requisition of property from the Contractor's stores is charged to the contract on which the property is to be used. The supporting document or issue slip shall show the contract number or equivalent code designation to which the issue is charged.

207.10 *Pricing.* Property records shall show a unit price for each item except for items constructed for research or development purposes by the Contractor. In the case of Contract-acquired property the price shall be determined in accordance with the system established by the Contractor in conformance with sound accounting principles and consistently applied. The unit price of Government-furnished property shall be as determined by the Government and furnished to the Contractor.

208. [Reserved]

209. *Identification.* Government property shall be recorded and identified by the contractor as provided in paragraph 307.

210. *Segregation or commingling of Government property and contractor's property.* Ordinarily Government property, particularly material, should be segregated and kept physically separate from contractor-owned property at all times. There will be occasions, however, where commingling of property would be advantageous to the Government. The property administrator should consider and arrange with the contractor plans for segregation and commingling of property. This agreement reached with respect to commingling shall be reduced to writing by the property administrator. Commingling may be allowed in the following types of cases:

(i) Where each commingling is approved by the property administrator; and

(ii) Where the Government property involved is plant equipment, special tooling or minor plant equipment which is clearly identified or marked as Government property and is supported by appropriate control records.

211. *Physical inventories.*

211.1 *Before termination or completion.* It shall be the responsibility of the property administrator to review and approve the type and frequency of physical inventories to be taken. In this respect, he may accept and approve in writing the contractor's established procedures if he determines that they adequately protect the interests of the Government and are in conformity with applicable regulations.

211.2 *Upon termination or completion.* Upon termination or completion of a contract, a physical inventory adequate for disposal purposes shall be required of all Government property applicable to the contract in the custody, control or possession of the Contractor. Standard items that have been modified may be described as standard items, with a general description of the modification. Items that have been constructed, such as test equipment, should be described in sufficient detail to permit a potential user to determine whether they are of sufficient interest to warrant further inspection.

211.3 *Inventories and selective examinations by the property administrator.* (a) The property administrator may, at his discretion, join with the contractor in taking of any inventory required to be made by the contractor.

(b) The property administrator should make selective examinations of the inventory being taken by the contractor when he determines that such procedure is necessary to protect the interests of the Government. When selective examinations are made they must embrace a representative number of items in the account and must adequately cover, by class and price range, all Government property involved.

211.4 *Quantitative and monetary controls.* As directed or required by proper authority, the property administrator shall require the contractor's physical inventories to be prepared on both a quantitative and monetary basis and be classified by categories such as material, special tooling, and minor equipment, plant equipment, etc.

211.5 *Discrepancies.* The property administrator shall proceed to adjust any discrepancies disclosed as a result of inventorying in accordance with the provisions of the contract and this Manual.

212 *Control of scrap and salvage.* Procedures for the control of scrap and salvage shall not be applicable to nonprofit research and development contracts unless the property administrator determines that the scrap or salvage is substantial in amount and that the Government is not receiving sufficient benefits from the use or disposal thereof, in which event the procedures set forth in paragraph 403 of § 30.2, shall be applied.

213. *Records to be maintained by Government personnel.*

213.1 *Records of specific contracts where property is involved.* (a) Where a contract provides for the use of Government property a copy of the contract shall be made available or furnished to the Property Administrator.

(b) The property administrator shall maintain a record of each contract assigned to him for property administration. That record shall contain the following minimum information:

(i) Contract number and name of Contractor.

(ii) Type of contract (CPFF, fixed price, research and development, etc.)

(iii) End item to be produced or services to be performed, and the points of inspection and acceptance.

(iv) Record of amendments and changes pertaining to Government property.

(v) Listing and type of all subcontracts which involve Government property.

(vi) Provisions of contract pertaining to liability of the Contractor for loss, damage or improper use of Government property.

(vii) Record of Contract Administrators and dates of tenure.

(viii) Record of Property Administrators and dates of tenure.

(ix) Record of Plant Representatives (or Officers-in-Charge) and dates of tenure.

(x) Record of written approval of Contractor's property control procedures.

(xi) Record of deviations granted in property procedures. (The deviations granted shall be in accordance with procedural regulations issued by each department.)

(xii) Record of property audits and inspections performed by the responsible agencies in each department.

(xiii) Records of property inspections during production and usage analyses performed;

(xiv) Record of any deficiencies found in property control and the corrective action taken.

(xv) Interim and final clearance data for Government property.

(xvi) A file of all documents evidencing receipt of Government-furnished property by the contractor where required in accordance with C-305; and

(xvii) A file containing copies of all instruments affecting relief from responsibility for Government property.

213.2 *Control records to be maintained.* The Property Administrator shall maintain a system of file control that will permit the ready location of any document that he is required by this manual to maintain.

213.3 *Record of end items.* The Property Administrator shall maintain a record of all end items produced under the contract, based upon authenticated receiving reports or processed vendors' shipping documents, as follows:

(a) When there is no lapse of time between Government inspection and acceptance of the end items and shipment from the Contractor, the records shall, as a minimum, consist of a summarization of quantities accepted and shipped. When end items are accepted by the Government and stored with the Contractor, the record shall show the quantities stored and location.

(b) Some contracts provide that end items are to be retained by the Contractor for further use under the contract. Upon acceptance of such items, they shall be considered to be "Government-furnished property" and shall be recorded by the Contractor as required by the terms of the contract.

214. *Numbering property accounts.* A property account, consisting of records maintained either by a Contractor or Government personnel, shall be assigned a property account number.

215. *Auditing property accounts.* Records of Government property shall be audited by the Departments as frequently as conditions warrant. Any such audit or audits may take place at any time during the performance of the contract, upon completion or termination of the contract, or at any time thereafter. These audits will include records maintained by the contractor and such records as may be maintained by Government personnel in connection with such property. The property administrator and the contractor shall make all property records, including correspondence related thereto, available for inspection by the auditors.

PART III—CONTRACTOR'S OBLIGATIONS

300. *Scope of part.* This part covers (i) the duties and responsibilities of the Contractor with respect to Government property, (ii) the liability of the Contractor for Government property lost, damaged, or for which the Contractor is otherwise unable to account, and (iii) the obligations of the Contractor with respect to the control of Government property, both physically and administratively. This Part III of this manual is designed so that it may be incorporated by reference in the contract, as desired.

301. *General.* The contractor shall be directly responsible for and accountable for all Government property in accordance with the provisions of the contract. The contractor shall maintain and make available such records as are required by Part III of this Manual and must account for all Government property until relieved of responsibility therefor in accordance with the procedures as set forth hereinafter. Liability for loss, damage, or excessive use of property in a given instance will necessarily depend upon all circumstances surrounding the particular case and must be considered and determined in accordance with the provisions of the contract. The contractor shall furnish all necessary data substantiating any request for discharge from responsibility.

302. *Definitions.* The definitions used in Part I of this manual apply to those terms defined therein when used in this Part III of this manual or in the contract.

302.1 *Contracting Officer.* As used in this Part III, the term "Contracting Officer" shall include any authorized representative of the Contracting Officer acting within the limits of his authority, including the Contract Administrator and the Property Administrator, as those terms are defined in paragraphs 103.2 and 103.5 of Part I.

303. *Contractor's responsibility.* A Contractor shall be responsible for all Government property in his custody or control in accordance with the terms of the contract. The Contractor may be relieved of responsibility for Government property by any of the following methods, subject in any case to specific contract provisions or specific instructions of the Contracting Officer within the scope of the contract:

(a) *Consumption of property in the performance of the contract.* To the extent that property has been consumed or expended for proper purposes and in reasonable amounts in the performance of the contract, the Contractor shall be relieved of responsibility for such property.

(b) *Retention by the contractor.* This may occur when the contract is completed or terminated, or otherwise in accordance with the provisions of the contract. The Contractor shall be relieved of responsibility for all property which has been retained by the Contractor, provided that the Government shall have approved the retention and shall have been reimbursed therefor in accordance with the terms of the contract or applicable regulations.

(c) *Sale of property.* The Contractor shall be relieved of responsibility for Government property sold with the approval of the Contracting Officer, in accordance with applicable regulations, provided, however, that the proceeds from such sale shall have been received by or credited to the Government.

(d) *Shipment of Government property from a contractor's plant.* The Contractor shall be relieved of responsibility when Government property is shipped from the Contractor's plant pursuant to the instructions of the Contracting Officer.

(e) *Written advice of contracting officer.* The contractor shall be relieved of responsibility for Government property lost, damaged, destroyed, or consumed, in excess of that normally anticipated in the manufacturing or processing operation, as the result of appropriate action by the contracting officer to determine the liability of the contractor: *Provided,* Such determination is furnished to the contractor in writing and the Government shall have been adequately reimbursed when appropriate. If the contract administrator is the contracting officer or a designated representative of the contracting officer for that purpose, he will thereupon determine the contractor's liability.

304. *Contractor's liability.* Subject to the terms of the contract, the Contractor may be liable when shortages of Government property are disclosed or when Government property is lost, damaged, or destroyed, or when there is evidence of unreasonable use or consumption of Government property as measured by the allowances provided for by the terms of the contract or the appropriate bill of materials.

305. *Receipting for Government property.* The contractor shall be required to furnish a written receipt for all, or specific classes of Government provided property only in those instances where such action is determined by the property administrator to be essential for maintenance of minimum acceptable property controls. In these instances the property administrator shall maintain for each contract a file of such documents or property record cards. Where such evidence of receipt is required, it shall be provided by the contractor not later than the time he submits his application for payment (public voucher).

306. *Property control records.* The Contractor shall maintain proper control over all Government property in accordance with methods which have been established by the contractor and approved by the property administrator consistent with the following:

(a) *Material issued directly upon receipt, minor plant equipment and special tooling—*

(i) *Fixed price contracts.* In the case of Government-furnished material which is issued directly by the contractor upon receipt so as to be considered expended under the contract, and in the case of minor plant equipment, and special tooling, the documents evidencing receipt and issue maintained by the contractor will be accepted as property control records; and

(ii) *Cost type contracts.* For material, whether Government-furnished or contractor-acquired, issued by the contractor directly so as to be considered expended under the contract, for minor plant equipment, and for special tooling, the Government invoices, contractor's purchase documents or other documentary evidence of acquisition and issue, will be accepted as adequate property control records.

(b) *Material maintained in stocks.* In the case of material furnished by the Government under fixed price contracts, and in the case of material furnished by the Government or procured by the Contractor, title to which vests in the Government, under cost-type contracts, which material is maintained by the Contractor in stock or stores, the Contractor shall compile and maintain appropriate records covering the description, cost when known, acquisition and disposition, and such other information as may be required to identify the property. Records of consumption on a unit or accumulated basis shall also be maintained. The Contractor shall be prepared to locate such property within a reasonable time after request therefor.

(c) *Plant equipment.* In the case of plant equipment furnished by the Government under fixed price contracts, or in the case of plant equipment furnished by the Government or procured by the Contractor, title to which vests in the Government under, cost-type contracts, the Contractor shall compile and maintain individual property records covering the description, cost, acquisition, and disposition of each item of plant equipment and such other information as may be required to identify the property. The Contractor shall be prepared to locate any item of such property within a reasonable time after request therefor.

(d) *Real property.* In the case of real property furnished by the Government under fixed price contracts, and in the case of real property furnished by the Government or acquired by the Contractor, title to which vests in the Government, under cost-type contracts, the Contractor shall maintain a continuous itemized record of the description, location, acquisition cost, and disposition of all Government real property, including unimproved real property, all alterations and all construction work, and any site connected with such alteration or construction, acquired by purchase, lease or otherwise. This itemized record may be in the form of a cross-reference to maps, drawings, plans and specifications.

(e) *Records of related data and information.* Except as provided in this subparagraph, the requirements of this § 30.3 are not applicable to manufacturing or assembly drawings, installation, operation, repair or maintenance instructions, or other similar data and information furnished by the Government to the contractor. The contractor shall maintain property control and accountability with respect to such Government-furnished property in accordance with sound industrial practice.

307. *Identification.* All Government property shall be recorded and identified as such by the contractor promptly upon receipt, and it shall remain so identified so long as it remains in the custody, control or possession of the contractor.

(a) *Extent of identification:*

(i) As a general rule, all Government material shall be identified as Government property except in those cases where—

(A) no materials of the same type at the same location are owned by the contractor, his employees, or other contracting agencies;

(B) adequate physical control is maintained over tool-crib items, guard force items, protective clothing and other items issued for use by individuals in the performance of their work under the contract;

(C) property is of bulk type or by its general nature of packing or handling precludes adequate marking, as may be determined by the property administrator; or

(D) property is commingled, as authorized by paragraph 210 hereof;

(ii) Government-owned special tooling shall be marked with the designation of the Military Department responsible for funding and control of such tooling, as follows: Army—"USA", Navy—"USN", and Air Force—"USAF", unless it is determined that such marking will damage the special tooling or is otherwise impracticable. Marking and identification procedures may be expanded by the Department having cognizance over the tooling to include end item reference, drawing number, and such other information as may be desired in a given case. The identification "U. S." property shall not be changed solely to conform to the provisions of this paragraph;

(iii) Unless already marked in accordance with these instructions, all Government-owned plant equipment, including industrial reserve plant equipment, shall be marked by the contractor with an identification number, except minor plant equipment; or when the size of the equipment or the nature of the material from which it is made makes it impracticable, in which case such item will be assigned an identification number for record purposes, which number shall be shown in the plant equipment property record; or the equipment is accessory or auxiliary and attached to or otherwise a part of an item of plant equipment and is required for its normal operation, in which case such item shall be entered and described on the record of the equipment to which it is attached or of which it is otherwise a part. Once an identification number has been affixed to an item of plant equipment, the identification will be permanent and will not be changed so long as the equipment remains under the control of the same Military Department (but see (iv) below). Identification shall be effected by affixing a metal, fibre, plastic or other plate directly to the equipment; by using indelible ink, acid or electric etch, steel dies, or any other legible, permanent, conspicuous, and tamper-proof method. Identification shall consist of the following markings:

(A) An indication of Government ownership of the Military Department responsible for funding and control of the plant equipment, as follows: Army—"USA", Navy—"USN", and Air Force—"USAF"; however, the identification "U. S." property shall not be changed solely to conform to the provisions of this paragraph;

(B) A two-part identification number, furnished by the Government, consisting solely of numerals except as provided in (C) below. The first part shall be the property account number and the second part shall be a serial number. In case plant equipment furnished by the Government is already identified as property of a Military Department, no change shall be made in the markings, except as provided in (iv) below; and

(C) In the case of items included within a standard Departmental registration system, for example, automotive, construction, or weight-handling equipment, application for a proper registration number will be made to the cognizant Department, which number shall be used in lieu of any other identification number.

(iv) Government identification markings shall be removed prior to sale or scrapping. The markings so removed shall be shown on the appropriate documents involved. In the case of a transfer of funding and control responsibilities to other Military Departments new identification markings, in accordance with the requirements of (ii) or (iii) above, may be affixed upon receipt of the equipment by the receiving Military Department.

(b) *Recording Identification Numbers.* Assigned property identification numbers will be recorded on all applicable receiving documents, shipping documents, and other documents pertaining to the property accounts.

(c) *Components.* Components which are permanently removed from items of Government property as a result of modification, or otherwise, shall be marked or identified by the Contractor according as to whether the component is classified as material, plant equipment, minor equipment or special tooling. Material, minor equipment and special tooling permanently removed from Government property need not be marked or identified except when returned to stock or stores.

(d) *Method of identification.* Identification shall be effected by affixing a metal, fibre, plastic or other plate directly to the equipment; by using indelible ink, acid or electric etch, steel dies, or any other legible, permanent, conspicuous, and tamperproof method. Identification shall consist of the following markings:

(i) An identification of Government ownership, viz., the letters "U. S."

(ii) The Contractor shall affix to each item of plant equipment the identification number furnished by the Government. In case the plant equipment furnished by the Government is already identified as property of the U. S. Government, the markings shall not be removed. In addition to the markings prescribed by the Government, the Contractor may use a severable marking of its own, for its own records, provided that the Contractor shall remove such marking upon return of the equipment to the Government, or upon making any other disposition.

308. *Segregation and commingling.* The contractor shall keep Government property segregated, except where commingling is approved by the property administrator as being to the mutual benefit of the Government and the contractor, or where the Government property involved is plant equipment, special tooling or minor plant equipment which is clearly identified or marked as Government property and is supported by appropriate control records.

309. *Inventories.* (a) *Interim physical inventory.* The contractor shall take a physical inventory of Government property whenever required by the property administrator, but such inventory shall not normally be required of the cnotractor more often than once a year. The inventory shall show the quantity and monetary value of each item of property inventories, and shall normally be limited to materials and minor equipment held in stocks and stores, and plant equipment. It shall be classified by categories of whatever items are inventories, such as material, special tooling, minor equipment, plant equipment, etc.

(b) *Joint physical inventory and selective examinations.* The property administrator, if he desires, may join with the contractor in taking the inventory required to be taken by the contractor. The property administrator shall have the right to take an inventory or make selective examinations, whenever he deems it necessary to protect the Government's interest.

(c) *Terminal physical inventory.* The contractor shall take upon completion or termination of the contract, a physical inventory adequate for disposal purposes of all Government property applicable to the contract in the custody, control, or possession of the contractor. The inventory shall be prepared on both a quantitative and monetary basis and be classified by categories, such as material, special tooling, minor equipment, plant equipment, etc. Standard items that have been modified may be described as standard items, with a general description of the modification. Items that have been constructed, such as test equipment, should be described in sufficient detail to permit a potential user to determine whether they are of sufficient interest to warrant further inspection.

310. *Control of scrap and salvage.* Procedures for the control of scrap and salvage shall not be required unless the property administrator determines that the scrap or salvage is substantial in amount and the Government is not receiving sufficient benefits from the use or disposal thereof in which event the following procedures shall be applicable:

(a) The contractor shall establish a procedure whereby all Government property that can be salvaged shall be returned to Government stock, which procedure shall be subject to the approval of the property administrator; and

(b) If the property administrator determines that the contractor's scrap procedures and records are adequate to protect the Government's interest, he shall approve same in writing and furnish the contractor a copy thereof. If the property administrator determines that corrective measures are necessary to protect the Government's interests, he shall so advise the contractor. Where corrective action would involve substantial increased costs or where agreement as to corrective action is not reached through mediation, the difference will be referred to the contract administrator.

§ 30.4 Appendix D—Rules for notice and hearing under gratuities clause in Armed Services Procurement Regulation 7.104–16.

1. *Introduction.* Section 631 of the Department of Defense Appropriation Act, 1952, Public Law 179, 82d Congress,* and similar statutory requirements in subsequent Department of Defense appropriation acts, require all contracts, other than contracts for personal services, which call for the expenditure of funds appropriated for the military departments under the Act to contain a clause permitting the termination of the contractor's right to proceed under any such contract and permitting the Government to pursue the remedies that it could pursue in the event of breach of contract if it is found after notice and hearing by the Secretary of the department with which the contract was made, or by his duly authorized representative, that gratuities (in the form of entertainment, gifts or otherwise) were offered or given by the contractor or by his agent or representative to any officer or employee of the Government with a view toward securing a Government contract or favorable treatment with respect to the awarding or amending, or the making of any determination with respect to the performing of such contract. The military departments have prescribed the use of such clause, as set forth in the Armed Services Procurement Regulation, paragraph 7.104–16, in contracts as required by the above Act and in other procurement contracts. It is the purpose of these rules to make provision for the giving of the notice of hearing, for the conduct of the hearing, and for other procedural matters incident to the exercise of the rights and special remedies provided by the prescribed clause, wherever it is now or may hereafter be used in contracts of the military departments. In the interest of uniformity in proceedings before the three military departments, these rules are hereby adopted. Nothing herein shall be construed to affect or impair (1) the pursuit of other remedies available to the Government in any instance, or (2) the right of termination of any contract for any reason available to the Government under the terms of such contract.

2. *Definitions. Department.* The term "department" means the Department of the Army, the Department of the Navy, or the Department of the Air Force.

Secretary. The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of any military department.

Designee. The term "designee" means the person or board to whom authority has been delegated by the Secretary under Rule 3. The designee is the Secretary's authorized representative.

3. *Delegation of authority.* The Secretary may delegate to any person, military or civilian, or board of such persons within his Department all the authority of the Secretary conferred by statute or the prescribed contract clause to give notice of hearings, to conduct hearings and to make findings of fact with respect to (i) whether a gratuity was offered or given by a contractor or any agent or representative of such contractor to a Government officer or employee with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending or the making of any determinations with respect to the performance of such contract; and (ii) where appropriate, the amount of the costs incurred by the contractor in providing such gratuity. If the Secretary delegates his authority to a board, one of the members thereof shall be a person trained in the law, and the Secretary shall designate one member to be the presiding officer of the board.

4. *Notice and contents.* Whenever information coming to the attention of the Department indicates that the procedures provided herein may be properly invoked, the Department may cause a written notice to be served upon the contractor in the manner hereinafter provided. The notice shall be signed by the Secretary or his designee and dated and shall include the following items:

(a) A statement of the time, place, and purpose of the hearing, and the authority and jurisdiction under which it will be held. The statement as to purpose need only identify the contract clause, the contract or contracts involved, and the ultimate facts to be determined. The time of the hearing shall not be less than 10 days after service of the notice.

(b) Brief allegations setting forth the circumstances surrounding the offering or giving of the gratuity, including a description of the alleged gratuity itself and its estimated cost to the contractor; an identification of the offeree or donee and of the offerer or donor and the latter's relationship to the contractor; and the approximate date and place of the alleged offer or gift. Such allegations need be only sufficient to apprise the contractor reasonably of the issues involved in the hearing.

(c) A request that the contractor answer in writing the allegations of the notice, including in his answer such facts or argument as he may wish, and that he attend the hearing to adduce such evidence with respect to the alleged offer or gift as he may desire.

A suggested form of notice is set out as an appendix to these rules.

5. *Service of notice.* Service shall be made by mailing or delivering a copy of the notice to the contractor. Delivery of a copy means handing it to the party to be served, or, if the party is a corporation, partnership, or unincorporated association, handing it to an officer, partner, managing or general agent, or any other agent authorized by appointment or by law to receive service of process, or by leaving the copy at the contractor's office with the person in charge thereof. Service by mail shall be made only by certified mail and service shall be complete upon mailing. The manner of service shall be evidenced by the signed endorsement of the person making the service upon a copy of the notice to be included in the record of the proceeding. Service of notice may be accepted or waived by the contractor by written endorsement on a copy of the notice.

6. *Continuances and delays.* The authority to grant continuances or to adjourn the hearing shall rest with the person presiding at the hearing. Continuances will only be allowed for the most compelling reasons.

7. *Parties.* The parties to the hearing will be the contractor concerned and the Government. No intervention by other persons shall be permitted.

8. *Representation and hearing assistants.* The parties may be represented at the hearing and proceedings incident thereto by legal counsel. Upon the appearance of record of legal counsel of the contractor in the proceedings, service of papers as may thereafter be required may be made upon such legal counsel. The Department will make available such technical assistants, including a reporter, secretary or notary, as may be required.

9. *Transcript.* Testimony and arguments shall be reported verbatim. The reporter or secretary shall make available to the contractor and to the Government transcripts of the proceedings, including all testimony and copies of all documentary exhibits upon the payment of the reasonable costs thereof as the Department may by order fix.

10. *Hearings.* Hearings shall be conducted by the Secretary or his designee. Hearings will be as informal as may be reasonably appropriate under all the circumstances. Evidence and testimony, although not ordinarily admissible under legal rules of evidence, may be received subject to the discretion of the person presiding at the hearing. Immaterial, irrelevant, or unduly repetitious evidence shall be excluded. The parties may stipulate as to any facts or testimony. The testimony of witnesses shall be under oath and witnesses shall be subject to cross-examination. The hearing officer shall make such rulings with respect to the conduct of hearings as circumstances may require to ensure the orderly and expeditious presentation of evidence in a manner fair to the parties and consistent with these Rules and requirements of due process of law.

11. *Depositions.* Following service of the notice of hearing, a deposition may be taken as herein provided, and placed in evidence whenever the ends of justice will be served thereby.

(a) *Notice to take.* When either party desires to take a deposition, unless the parties stipulate as to the time when, and place where, the deposition is to be taken, the name of the officer before whom it is to be taken, and the names and addresses of the witnesses, the moving party shall give to the opposite party at least ten days' notice of the time when and the place where such deposition will be taken, the name and address and official title of the officer before whom it is proposed to take the deposition, and the names of the witnesses. A deposition may be taken either upon written interrogatories or upon oral examination, as may be specified in the notice. If the deposition is to be taken upon written interrogatories, copies thereof must accompany the notice to take depositions; if the opposite party desires to submit cross-interrogatories, written cross interrogatories should be served upon the party giving the notice within 5 days from the receipt of the notice to take the deposition. Notices may be served upon the contractor as provided by Rule 4 or upon his legal counsel of record. Service upon the Government may be made upon the person signing the notice of hearing or the Government representative of record. If service is made by mail, the mail shall be registered and service will be complete upon mailing.

(b) *Taking depositions.* Depositions may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken, to administer oaths. Witnesses shall be under oath and shall be subject to cross-examination as at the hearing. Objections will be reserved for determination at the hearing; provided, however, objections as to the form of questions shall be made and noted in the deposition. Each deposition shall show the caption of the proceeding, the place and date of taking, the names of the witnesses, and the party by whom called. The officer taking a deposition shall enclose the original deposition and exhibits, in a sealed packet, with postage or other transportation prepaid, and forward the same to the Secretary or his designee.

(c) *Use of deposition.* Testimony taken by deposition will not be considered until

*The provisions of § 631 of Public Law 179, 82d Congress have been enacted as permanent law (5 U.S.C. 174).

offered in whole or in part and received in evidence. A deposition taken by one party may be offered by the opposite party.

12. *Submissions without appearance: absence of parties.* If the contractor fails or refuses to appear or to make a written submission without appearing at the hearing, the hearing shall proceed upon such evidence as the Government may offer. The unexcused absence of any party shall not be occasion for delay of the hearing. Notwithstanding the nonappearance of the contractor at the hearing, proposed findings, conclusions, and argument may be submitted in writing on the contractor's behalf as provided in Rule 13.

13. *Argument and request for findings.* Within the discretion of the person presiding at the hearing, limited oral argument may be presented by the parties upon the completion of the hearing. Within ten days after the hearing is completed, both parties may file in writing with the person or board conducting the hearing proposed findings and conclusions with reasons and argument in support thereof. Copies will be provided to the opposite party.

14. *Findings and decision.* As soon as practicable after completion of the hearing and the timely submission of proposed findings and conclusions, the person or board that conducted the hearing shall make written findings and conclusions with respect to all material issues; reasons for the findings will be included at such length as may be appropriate. The findings where adverse to the contractor will include, in addition to other appropriate items, the following: (i) a description of the gratuity that was offered or given; (ii) a statement of the costs incurred by the contractor in providing the gratuity; (iii) the name and relationship to the contractor of the person by whom the gratuity was offered or given on the contractor's behalf; (iv) the name and position of the officer or employee of the Government to whom the gratuity was offered or given; (v) a description of the contract which the Contractor sought to secure by the offering or giving of the gratuity, or a statement as to the nature of the favorable treatment so sought with respect to the awarding or amending, or the making of any determinations with respect to the performing of a contract. When the findings are made by a designee they shall be forwarded to the Secretary with recommendations as to whether the right of the contractor to proceed under any contract mentioned in the notice of hearing shall be terminated, and as to the exemplary damages to be imposed against the contractor, which shall be in an amount which shall not be less than three nor more than ten times the costs incurred in providing the gratuity.

Approved this 5th day of July 1952 by: Earl D. Johnson, Assistant Secretary of the Army; H. R. Askins, Assistant Secretary of the Navy; Roswell L. Gilpatric, Under Secretary of the Air Force.

APPENDIX TO RULES

Form of Notice

Before the ---------- of the ----------.

File No. --------

In the Matter of the XYZ Corporation, Contract --------: Proceedings Pursuant to Clause -------- of Contract No. --------.

To: XYZ Corporation,
Rockefeller Plaza,
New York City, New York.

1. You are hereby notified that at --- M. on -------- 1952, at room ---- of the -------- Building, --------, a hearing will be held before ---------- to determine whether or not under the provisions of clause ------ of Government contract ---------- a gratuity has been offered or given on behalf of the XYZ Corporation to an officer or employee of the Government of the United States with a view toward securing (a contract) (favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performing of a contract). If it is found that a gratuity was so offered or given, your right to proceed under the contract may be terminated, and a penalty imposed in accordance with the contract clause mentioned above. In the event of such termination the Government will be entitled to pursue the remedies available for breach of contract.

2. The hearing at the time and place aforesaid will be held under the authority of (cite applicable Public Law and clause of contract(s)). Enclosed is a copy of the Rules promulgated by the Secretary of the ---------- pursuant to which the hearing will be conducted. Papers pertaining to the proceedings may be captioned as above.

3. The contract(s) involved in the hearing, and which is (are) subject to termination if a gratuity is found to have been given or offered to secure favorable action as aforesaid, is (are) identified as follows:

Contract number ---- dated ---------- under the cognizance of ---------- and executed by ---------- on behalf of the Government as the Contracting Officer.

4. The gratuity offered or given and the circumstances relating thereto are alleged to be as follows: (Include in a concise statement the nature of the alleged gratuity; a fair estimate of the costs incurred by the contractor in providing the gratuity; the identity of the offeree or donee and his position with the government; the identity of the offerer or donor and his relationship to the contractor; and the approximate date, time, and place of the alleged offer or gift. Also allege as appropriate, that the gratuity was (offered) (given) with a view toward securing a Government contract or favorable treatment with respect to awarding or amending, or the making of a determination with respect to the performing of a Government contract. Identify or describe the contracts involved). On proof of the facts alleged as aforesaid, the Government, in accordance with the applicable statutory and contract provisions mentioned in paragraph 2, may terminate your right to proceed under the contract identified in paragraph 3 and to pursue the remedies available for breach of contract; also to impose exemplary damages as provided in such law and contract provision.

5. If you desire to be heard in this matter, you are requested to file with the Department on or before the time of the hearing a written answer and to appear at the hearing.

Dated: ----------

By direction of the -------- of the ----------.

NOTE: Portions set apart by parentheses should be stricken or modified as appropriate to conform to the facts.

§ 30.5 Appendix E—Defense Contract Financing Regulations.

The regulations with respect to Defense Contract Financing Regulations are contained in Part 163, Subchapter E, of this chapter.

SUBCHAPTER B—PERSONNEL; MILITARY AND CIVILIAN

PART 41—ADMINISTRATIVE DISCHARGES

Sec.
41.1 Purpose and cancellations.
41.2 Applicability.
41.3 Administration.
41.4 Definitions.
41.5 Pre-service activities.
41.6 Standards for discharge.
41.7 Reasons for discharge.
41.8 Procedures for discharge.

AUTHORITY: §§ 41.1 to 41.8 issued under sec. 161 of the Revised Statutes (5 U.S.C. 22); sec. 1162 and Chapters 361, 569, and 861 of Title 10, United States Code.

§ 41.1 Purpose and cancellations.

This part revises the standards and procedures governing the administrative discharge of enlisted persons from the Armed Forces. Former Part 44 (13 F.R. 5879) and any other existing regulations in conflict with the provisions of this part are superseded and cancelled ninety days after date of issue of this part.

§ 41.2 Applicability.

The policies and regulations set forth herein are applicable to the Army, the Navy, the Air Force, the Marine Corps, and by agreement with the Secretary of the Treasury, to the Coast Guard, and to all Reserve components thereof.

§ 41.3 Administration.

Each of the Armed Forces to which these policies and the regulations in this part are applicable will, prior to the cancellation date of former Part 44 (13 F.R. 5879) issue appropriate regulations under this part.

§ 41.4 Definitions.

(a) *Military behavior.* "Military behavior" as used herein refers to the conduct of the individual while a member of an Armed Service.

(b) *Military record.* "Military record" as used herein includes an individual's military behavior and performance of duty, and reflects the character of the service he has rendered while a member of an Armed Service.

(c) *Honorable Discharge.* An "Honorable Discharge" is a separation from an Armed Service with honor.

(d) *General Discharge.* A "General Discharge" is a separation from an Armed Service under honorable conditions of an individual whose military record is not sufficiently meritorious to warrant an Honorable Discharge.

§ 41.5 Pre-service activities.

Except for misrepresentations (including omissions) made in connection with his enlistment or induction, activities that a member of the Armed Forces engaged in before he acquired status in the Armed Forces may not be considered in determining the type and character of discharge or separation to be issued. The type and character of the discharge will be determined solely by the member's military record.

§ 41.6 Standards for discharge.

The type and character of discharge or separation and the reasons therefor will be determined in accordance with the following standards:

(a) *Honorable Discharge.* Issuance of an Honorable Discharge is conditioned upon:

(1) Proper military behavior: Ordinarily, an Honorable Discharge will not be issued if an individual has been convicted of an offense by General Court-Martial or has been convicted by more than one Special Court-Martial in the current enlistment, period of obligated service, or any extensions thereof.

(2) Proficient and industrious performance of duty having due regard to the rate, rank or grade held and the capabilities of the individual concerned.

(3) Eligibility for discharge by virtue of one of the following reasons:

(i) Expiration of enlistment or fulfillment of service obligation, as applicable.

(ii) Convenience of the Government.

(iii) Hardship or dependency.

(iv) Minority.

(v) Disability.

(vi) Unsuitability.

(vii) Security.

(viii) When directed by the Secretary of the Department concerned.

(ix) Resignation—own convenience.

Special considerations: An individual may, where otherwise ineligible, receive an Honorable Discharge if he has, during his current enlistment, period of obligated service, or any extensions thereof, received a personal decoration as defined by the respective services, or is discharged as a result of a disability incurred in line of duty. In each of the above situations, the individual's military record should form the basis for the action taken.

(b) *General Discharge.* Issuance of a General Discharge is conditioned upon:

(1) Military record not sufficiently meritorious to warrant an Honorable Discharge.

(2) Eligibility for discharge by virtue of one of the reasons listed in paragraph (a)(3) of this section.

(c) *Undesirable Discharge.* An Undesirable Discharge is an administrative separation from the service "Under Conditions Other than Honorable." It is issued for unfitness, misconduct or for security reasons. It will not be issued in lieu of trial by court-martial except upon the determination by an officer exercising General Court-Martial jurisdiction or by higher authority that the interests of the service as well as the individual will best be served by administrative discharge.

Special considerations: Notwithstanding the foregoing, whenver the particular circumstances in a given case so warrant, an administrative discharge other than an Undesirable Discharge may be issued.

§ 41.7 Reasons for discharge.

(a) *Expiration of enlistment or fulfillment of service obligation (as applicable).* Discharge with an Honorable or a General Discharge as warranted by the individual's military record (§ 41.6 (a) or (b), as applicable).

(b) *Convenience of the Government.* Discharge with an Honorable or a General Discharge as warranted by the individual's military record, for the following reasons:

(1) General demobilization, reduction in authorized strength or by an order applicable to all members of a class of personnel specified in the order.

(2) Acceptance of a commission or appointment in any branch of the Armed Services, for active duty only.

(3) National health, safety or interest.

(4) To permit immediate enlistment or reenlistment.

(5) Erroneous induction or enlistment.

(6) To provide for the discharge of individuals serving in unspecified enlistment.

(7) In the case of women, marriage, pregnancy, parenthood, or custody of children under age 18.

(8) For other good and sufficient reasons when determined by the Secretary of the Department concerned.

(c) *Resignation — own convenience.* Discharge with an Honorable or a General Discharge as warranted by the individual's military record, on an individual basis, in accordance with regulations of the Service concerned. Such discharge may be effected as early release for the convenience of the Government.

(d) *Dependency or hardship.* (1) Discharge or separation or release by reason of dependency or hardship with an Honorable or a General Discharge, as warranted by the individual's military record. Discharge may be directed when it is considered that undue and genuine dependency or hardship exists, that the hardship or dependency is not of a temporary nature, and that conditions have arisen or been aggravated to an excessive degree since entry into the Service and the member has made every reasonable effort by means of application for Family Allowance and voluntary contributions which have proven inadequate; that the discharge of the individual will result in the elimination of, or will materially alleviate the condition and that there are no means of alleviation readily available other than by such discharge.

(2) Undue hardship does not necessarily exist solely because of altered present or expected income or because the individual is separated from his family or must suffer the inconveniences normally incident to military service.

(e) *Minority.* Discharge by reason of minority with an Honorable or General Discharge as warranted by the individual's military record, or release by voidance of enlistment upon determination that the individual's age was misrepresented upon enlistment or induction as follows:

(1) Males, if enlisted and under 17 years of age, or inducted and under 18 years and six months of age, when verified, release from military control by discharge, release or voidance of enlistment.

(2) If an enlisted man, enlisted without proper consent and having passed his 17th birthday, but not his 18th birthday, discharge upon application of par-

ent or legal guardian as prescribed by law.

(3) If an enlisted man having passed his 18th birthday when verified—retain if otherwise qualified.

(4) Females, if enlisted and under 18 years of age, or inducted and under the age prescribed by law for such induction, release from military control by discharge, release or voidance of enlistment.

(5) If an enlisted woman enlisted without proper consent, having passed her 18th birthday, but not her 21st birthday, when verified—discharge upon application of parent or legal guardian as prescribed by law.

NOTE: The enlistment of a minor with false representation as to age without proper consent will not in itself be considered as fraudulent enlistment.

(f) *Disability.* Discharge by reason of physical disability, with an Honorable or General Discharge as warranted by the individual's military record, when it has been determined as a result of medical findings that the individual is physically unfit to perform the duties of his office, rank, grade or rating.

(g) *Unsuitability.* Discharge by reason of unsuitability, with an Honorable or General Discharge as warranted by the individual's military record. Such discharge will be effected when it has been determined that an individual is unsuitable for further military service because of:

(1) Inaptitude: Applicable to those persons who are best described as inapt, due to lack of general adaptability, want or readiness of skill, unhandiness, or inability to learn.

(2) Character and behavior disorders: Character and behavior disorders, disorders of intelligence, and transient personality disorders due to acute or special stress as defined in "Joint Armed Forces Nomenclature and Method of Recording Psychiatric Conditions—1949" (SR 40–1025–2; NavMed P–1303; AFR 160–13A).

(3) Apathy, defective attitudes and inability to expend effort constructively: As significant observable defect, apparently beyond the control of the individual, elsewhere not readily describable.

(4) Enuresis.

(5) Alcoholism: Chronic, or addiction to alcohol.

(6) Homosexual tendencies.

(7) Special considerations: For other good and sufficient reasons when determined by the Secretary of the Department concerned.

(h) *Security.* Discharge with the character of discharge and under conditions stipulated by the Secretary of Defense in directives which deal explicitly with this matter when retention is not clearly consistent with the interest of national security.

(i) *Unfitness.* Discharge by reason of unfitness, with an Undesirable Discharge, unless the particular circumstances in a given case warrant a general or honorable discharge, when it has been determined that an individual's military record is characterized by one or more of the following:

(1) Frequent involvement of a discreditable nature with civil or military authorities.

(2) Sexual perversion including but not limited to (i) lewd and lascivious acts, (ii) homosexual acts, (iii) sodomy, (iv) indecent exposure, (v) indecent acts with or assault upon a child, or (vi) other indecent acts or offenses.

(3) Drug addiction or the unauthorized use or possession of habit-forming narcotic drugs or marijuana.

(4) An established pattern for shirking.

(5) An established pattern showing dishonorable failure to pay just debts.

(6) For other good and sufficient reasons when determined by the Secretary concerned.

(j) *Misconduct.* Discharge by reason of misconduct, with an Undesirable discharge, unless the particular circumstances in a given case warrant a general or honorable discharge, when one or more of the following conditions have been determined:

(1) Conviction by civil authorities (foreign or domestic) or action taken which is tantamount to a finding of guilty of an offense for which the maximum penalty under the UCMJ is death or confinement in excess of one year; or which involves moral turpitude; or where the offender is adjudged a juvenile delinquent, wayward minor, or youthful offender as a result of an offense involving moral turpitude. If the offense is not listed in the MCM Table of Maximum Punishments or is not closely related to an offense listed therein, the maximum punishments authorized by the U.S. Code or the District of Columbia Code, whichever is lesser, applies. For the purpose of this subparagraph only, an individual shall be considered as having been convicted even though an appeal is pending or is subsequently filed.

(2) Procurement of a fraudulent enlistment, induction or period of obligated service through any deliberate material misrepresentation or concealment which, except for such misrepresentation or concealment, may have resulted in rejection.

(3) Prolonged unauthorized absence: When unauthorized continuous absence of one year or more has been established, but punitive discharge has not been authorized by competent authority.

§ 41.8 Procedures for discharge.

In accordance with the standards outlined in this part, the following procedures will be adhered to in effecting administrative discharges:

(a) *Honorable Discharge.* A separation with an Honorable Discharge may be effected by the individual's commanding officer or higher authority when the individual is eligible for or subject to discharge and it has been determined that he merits an Honorable Discharge under the prescribed standards.

(b) *General Discharge.* A separation with a General Discharge may be effected by the individual's commanding officer or higher authority when the individual is eligible for or is subject to discharge and it has been determined under the prescribed standards and in accordance with any prescribed administrative procedures that a General Discharge is warranted.

(c) *Discharge for unsuitability.* An individual recommended for an honorable or general discharge for reason of unsuitability shall be afforded the opportunity to make a statement in his own behalf.

(d) *Undesirable Discharge.* An Undesirable Discharge will be effected only by authority of a properly approved administrative action conforming to the prescribed standards, during which the following procedures and safeguards have been observed:

(1) The individual if subject to such discharge will, if his whereabouts is known, be properly advised of the basis for the contemplated action and afforded an opportunity to request or waive, in writing, the following privileges:

(i) To have his case heard by a Board of not less than three officers. In the case of non-regular component members, all boards so convened shall include appropriate numbers from the Reserve components. In the case of female members, all boards so convened shall include at least one female officer.

(ii) To appear in person before such board, subject to his availability, e.g., not in civil confinement.

(iii) To be represented by counsel, who, if reasonably available, should be a lawyer.

(iv) To submit statements in his own behalf.

(2) Separation with an Undesirable Discharge may be effected by an officer exercising general court-martial jurisdiction or by higher authority (including departmental headquarters) after review of the findings and recommendations made by any board which was convened to consider the case.

(3) Except for Reservists, Departmental Secretaries are authorized to waive the requirements set forth in subparagraph (1) of this paragraph (except subdivision (iv)), when such action is deemed in the best interest of the military service. Departmental Secretaries will advise the Assistant Secretary of Defense (Manpower, Personnel and Reserve) by memorandum not later than 15 July each year of any such actions taken during the preceding fiscal year, and the reasons therefor. The reporting requirement of this paragraph has been assigned Report Control Symbol DD–MP&R(A) 370.